

Transferable Development Rights and Building Lot Termination Programs in Montgomery County

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Executive Summary

The Transferable Development Rights (TDR) and Building Lot Termination (BLT) programs provide compensation to owners of property in the County's Agricultural Reserve. The County's Zoning Ordinance restricts development in the Agricultural Reserve in order to preserve farmland. The Council asked OLO to prepare this report, which examines the history of the TDR and BLT programs and assesses how well implementation over time has aligned with program goals and objectives. Overall, this report finds that Council and Planning Board action is necessary to allow the TDR and BLT programs to achieve their intended goals.

BACKGROUND

In 1980, the County established the County's Agricultural Reserve to preserve farmland and open space. Before 1980, the density for land that is now the Agricultural Reserve allowed one dwelling unit per five acres of land. Following establishment of the Agricultural Reserve, density limits were reduced to allow one dwelling unit per 25 acres. To compensate landowners for this loss of equity, the County established the Transferable Development Rights (TDR) program.

The TDR program is a zoning mechanism that grants property owners in the Agricultural Reserve one development right, or "TDR", for each five acres of land. Property owners can then receive compensation by selling TDRs to landowners or developers who can use them to develop at a higher density in designated areas elsewhere in the County. In 2008, the County established a Building Lot Termination (BLT) program to further limit non-agricultural residential development in the Agricultural Reserve.

Demographics of Farm Principal Producers: The history of structural racism has contributed to large racial disparities in farmland ownership in Montgomery County. White producers operated 92% of farms and 98% of farmed acreage in the County in 2017. The population of residents eligible to receive compensation through the TDR and BLT programs is therefore overwhelmingly White.

THE TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM

To receive compensation through the TDR program, property owners must first create a TDR and then sell the TDR to another party to achieve increased residential density in another part of the County. To create a TDR, a property owner must grant a perpetual easement to Montgomery County that severs that development right from the property. A property owner may sell a single TDR for each five acres of land, minus one TDR for each existing dwelling unit on the AR zone property. In the early years of the TDR program, the County maintained a "Development Rights Fund" as a safety net for farmers trying to sell TDRs and to assure that demand for TDRs existed until the master plan and zoning processes designated sufficient receiving areas to accommodate the supply of TDRs.

TDR Overlay Zone: The County’s Zoning Ordinance authorizes the establishment of “overlay zones,” that is, a zone mapped over the underlying zone that modifies the development standards of the underlying zone. In 2014, the County created a TDR overlay zone and applied that overlay to certain properties outside of the Agricultural Reserve. Owners of property in a TDR overlay zone have the option to develop their land with additional residential density acquired through use of purchased TDRs. Of note, no master plan approved since 2012 has created a new TDR overlay zone on any property.

County Acquisition of TDRs: In addition to the TDR program, five other County and State programs acquire agricultural preservation easements. The County has taken title to “buildable TDRs” for properties under certain County or State easements. The term “buildable TDRs” refers to single TDRs retained for each 25 acres of land in the AR zone that may be used for construction of a housing unit. At present, the County policy is to not sell these TDRs so as to avoid entering into competition against private landowners who seek to sell their TDRs.

TDR Supply and Receiving Capacity: OLO estimates there are currently 1,349 created but unused TDRs (excluding those held by the County Government). Planning Department data indicate the current maximum receiving capacity of TDR overlay zones is 966 TDRs. Thus, the supply of created but yet unused TDRs exceed receiving capacity by approximately 400 TDRs. OLO estimates the number of potentially usable TDRs (that is, TDRs created but yet to be used plus TDRs that could be created in the future) at 4,565. By this measure, the estimated remaining TDR supply is about four-and-a-half times greater than current maximum TDR receiving capacity.

TDR Data Quality: Key TDR quantitative components can be estimated but cannot be measured precisely. For example, the methodology used to calculate the potential supply of TDRs is dependent on assumptions regarding whether property owners who have yet to create TDRs elect to do so in the future. Moreover, OLO reviewed land records and found multiple discrepancies in the data provided by County agencies. OLO’s analysis suggests that the existing system for tracking TDRs requires review and improvement to ensure accuracy.

TDR Trends: The TDR program has been in existence for 40 years. The creation of TDRs peaked in 1985, shortly after the creation of the program. A steep decrease in the creation of TDRs occurred after 2006. From 1982 to 2006, an average of 383 TDRs were created every year. However, from 2007 to 2021, property owners created an average of 53 TDRs per year.

THE BUILDING LOT TERMINATION PROGRAM

Montgomery County established a building lot termination (BLT) program in 2008 to preserve farming and prevent fragmentation of the Agricultural Reserve by offering compensation to property owners in exchange for foregoing development of buildable TDRs. The BLT program allows for the voluntary placement of permanent land easements that prohibit construction of residential units and restrict the land to certain agricultural uses. Like TDRs, a property owner can receive compensation by creating a BLT and then selling it to another party that can use it

to develop at an increased density in a designated area outside of the Agricultural Reserve. The County created the BLT easement program, in part, to respond to concerns that the growing market for large homes on large lots led to increased land values that jeopardized the viability of farming in the Agricultural Reserve.

Use of BLTs to Increase Development Density: A developer that purchases BLTs may use them to increase permitted density on properties in certain zones. Specifically, the Zoning Ordinance requires the purchase of BLTs, or an equivalent payment to the Agricultural Land Preservation Fund (ALPF), for optional method development in the Commercial Residential and the Life Sciences Center zones and permits discretionary use of BLTs to increase density for the optional method development in the Commercial Residential Town and the Employment Office zones.

County Purchase of BLTs: The County Code authorizes the County to purchase agricultural easements including BLTs. The amount the County pays for a BLT is established by Executive Order. The County Executive last established BLT easement values in Fiscal Year 2014 with the minimum purchase value set at \$222,390 (\$257,407 in 2022 dollars).

Data on BLT Creation and Use: Comprehensive data on which properties would meet BLT eligibility requirements are not available, and as such, no precise estimates of the maximum number of potential BLTs can be calculated. Office of Agriculture staff roughly estimate the Agricultural Reserve Zone could theoretically produce about 1,000 BLTs. As of February 2022, 30 BLTs have been transferred to the County; 16 BLTs have been purchased by a private party and used as part of a development approval; and 15 BLTs have been created by not yet used.

Since 2018, the BLT program has had extremely limited activity, with no BLTs being created and six BLTs sold and used. In contrast, between 2011 and 2018, between four and nine BLTs were created per year. The majority of BLTs created between 2016 to 2018 have not yet been used according to Planning Department records.

Partial BLTs: The term “partial BLT” refers to a developer contribution to the County’s Agricultural Land Preservation Fund (ALPF). A developer may purchase a partial BLT when the requested additional density is less than the density that would be achieved through purchase of a whole BLT. Since 2012, the County has received payments for partial BLTs for 28 different development projects. The rate of partial BLT purchases has increased in recent years. From 2016 to present, approval of 23 development projects included a requirement to purchase a partial BLT. The partial BLTs for those 23 projects summed to a total of 10.3 BLTs. During the same time period, developers bought a total of seven whole BLTs.

The dollar amount that a developer must contribute to the ALPF for a partial BLT is determined by multiplying the portion of a BLT required by the Planning Board by the value of a whole BLT as established by Executive Order. For all partial BLTs required since 2013, the value of a whole BLT has been \$222,390 as determined by Executive Order in July 2013.

The ALPF and the BLT Account: The County established the ALPF as a revolving fund for agricultural land preservation purposes, including purchase of BLT easements. However, the initial seed money for the ALPF has not been replicated, and all on-going funding sources, including developer payments for partial BLTs, generate relatively small amounts of revenue. Of note, the County Code requires the County to maintain a separate BLT Account within the ALPF for partial BLT payments, which may be spent only to purchase BLT easements. However, the County has expended a cumulative multi-year total of \$0.99 million from the account to pay salary costs related to the management of agricultural preservation easement programs. To date, the County has not yet expended any funds in the BLT Account for the purchase of BLTs.

OLO RECOMMENDATIONS AND DISCUSSIONS QUESTIONS

Based on its review of the TDR and BLT programs, OLO presents the following recommendations and discussion questions:

Recommendation #1: *The Council should: (a) consider the future time span of the TDR program; (b) set a sunset date for creating new TDRs; and (c) direct the Planning Board to establish TDR receiving capacity necessary to accommodate the supply of created TDRs.*

Recommendation #2: *The Council should direct the Planning Department to develop a strategy to increase demand for BLTs.*

Recommendation #3: *At times, the TDR and BLT programs and affordable housing programs represent competing priorities within County land use policy. The Council and Planning Board should identify approaches for balancing these two priorities, with racial equity and social justice as a key consideration.*

Recommendation #4: *The Council should direct the Planning Department and the Office of Agriculture to review and improve existing systems and processes for tracking supply of TDRs and BLTs and establish a process for tracking receiving capacity for TDRs.*

Recommendation #5: *The Council should request the Executive update the Executive Order that determines the base value of BLTs to assure the dollar amount of developer contributions for partial BLTs are set at an appropriate level.*

Discussion Question #1: *In future years, should the County intervene in the TDR and BLT markets? If so, under what conditions or circumstances should the County intervene?*

Discussion Question #2: *What are the preferred uses for Agricultural Land Preservation Fund resources? Should the County support agricultural preservation administrative costs with General Fund resources to conserve ALPF funds for purchase of agricultural easements?*

Discussion Question #3: *Under current County land use and zoning policies, multiple types of public benefits compete for developer-provided public facilities, amenities or contributions. Moving forward, what should be the relative priority of agricultural preservation (as achieved through the BLT program) versus other public benefits in County land use and zoning policies?*

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OLO Report 2023-1

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Chapter 1. Introduction

Zoning refers to the government determining the purposes for which real property in its jurisdiction can be used and classifying areas of land into zones. Examples of different types of zones include residential, commercial, industrial, and mixed use (a zone allowing both residential and commercial uses on a parcel of land). Each zone has rules that govern, for example, the type of structures that can be built on land in the zone (e.g., single-family houses, apartments, industrial warehouses, retail stores), the permitted size or number of buildings, or the amount of off-street parking required.

In 1980, the County Council established the County's Agricultural Reserve, approximately 110,000 acres of land zoned primarily for agricultural use that stretches across the Northwest and part of the Northeast borders of the County (see map on page 7). The Reserve contains most of the County's working farms. The purpose of establishing the Agricultural Reserve was to preserve farmland and open space in the County, which can have many public benefits such as protecting air quality, controlling the cost of public services and reducing energy usage by preventing urban sprawl.¹ Since 2014, the zone that includes this land has been called the Agricultural Reserve zone or AR zone in the County's zoning laws.²

Zoning laws often specify the "density" allowed in each type of zone – a measure of the amount of development allowed on a property. In residential zones, density is measured by the number of residential units allowed per acre of land. In commercial, mixed-use, and other zones, density is measured by the square footage of buildings on a lot compared to the square footage of the lot – called the Floor Area Ratio (FAR).

Before 1980, the density for land that is now the Agricultural Reserve allowed one dwelling unit per five acres of land. Following establishment of the Agricultural Reserve, density limits were reduced to allow one dwelling unit per 25 acres of land – a process referred to as downzoning that reduces the value of an owner's equity in the land. To compensate landowners for this loss of equity, the County established the Transferable Development Rights (TDR) program. In 2008, the County established a Building Lot Termination (BLT) program in 2008 to further limit non-agricultural residential development in the Agricultural Reserve.

The Council has asked OLO to prepare this report, which examines the history of the Transferable Development Rights and Building Lot Termination programs, reviews the original intent of these programs and assesses how well implementation over time has aligned with program goals and objectives. In this report:

¹ *Functional Master Plan for the Preservation of Agriculture and Rural Open Space In Montgomery County*, October 1980, pages 27-30, <https://montgomeryplanning.org/wp-content/uploads/2016/09/PreservationAgricultureRuralOpenSpaceFunctionalMasterPlan1980ocr300.pdf>

² When the Agricultural Reserve was originally created, the zone was initially called the "Rural Density Transfer" zone or RDT zone. Before the Agricultural Reserve was created, the zone was called the "Rural Zone." For simplicity but with some exceptions, this report refers to the land in the Agricultural Reserve as the AR zone.

- **Chapter 2** describes the origins of the Agricultural Reserve and the TDR program, summarizes the intent of the TDR program and describes the zoning standards used to implement the TDR program. Finally, the chapter presents information about the demographic composition of the people who manage farms in Montgomery County.
- **Chapter 3** details the planning and zoning methods used to implement the TDR program in Montgomery County. In addition, the chapter presents data on the supply of, and the overlay zone receiving capacity for, TDRs in the County.
- **Chapter 4** describes the origin of the BLT program in Montgomery County and details the planning and zoning methods used to implement the program. In addition, the chapter presents data related to the BLT program.
- **Chapter 5** summarizes the key findings and observations from OLO's analysis of the TDR and BLT programs. The chapter also presents OLO's recommendations to the County Council regarding the TDR and BLT programs.
- **Chapter 6** includes written comments from the Chief Administrative Officer and the Planning Department on this report.

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Chapter 2. The Montgomery County Agricultural Reserve

Montgomery County's Transferable Development Rights (TDR) and Building Lot Termination (BLT) programs support the preservation of agricultural activity and open space in a portion of the County known as the "Agricultural Reserve." The goals of the County's agricultural land preservation effort, including the TDR and BLT program, are:

- To conserve farmland for future food and fiber production.
- To ensure a continued high-quality food supply for our citizens.
- To preserve the agricultural industry and rural communities.³

This chapter describes the origins of the Agricultural Reserve and the TDR program. (Chapter 4 describes the BLT program.) This chapter also summarizes the intent of the TDR program and the zoning standards used to implement the program. Finally, the chapter presents information about the demographic composition of the people who manage farms in Montgomery County.

A. Origin of the Montgomery County Agricultural Reserve and TDR Program

The County Council approved the *Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County* in October 1980. The Plan noted that preserving farmland and open space can have numerous public benefits including protecting air quality, controlling the cost of public services and reducing energy usage by preventing urban sprawl.⁴ The Plan concluded that portions of the County "contain a critical mass of productive farmland worthy of protection ..."⁵ Toward that end, the Plan identified approximately 110,000 acres in the County to be designated as the "Agricultural Reserve."⁶

Prior to 1980, much of the land in the northern and western portions of the County had been assigned the "Rural Zone," a zoning category with a minimum lot size of five acres. The Rural Zone did not promote continued farming nor did zoning rules discourage subdivision of farmland into multiple five-acre lots. The Functional Master Plan found that "despite the enactment of the ... Rural Zone (5-acre minimum) in 1974, the conversion of farmland throughout the entire County continues to occur."⁷ The Functional Master Plan implemented strategies to preserve agricultural activity and open space in the County:

³ Montgomery County Office of Agriculture, *Agricultural Land Preservation*, <https://www.montgomerycountymd.gov/agservices/ag-preservation.html>.

⁴ *Functional Master Plan for the Preservation of Agriculture and Rural Open Space In Montgomery County*, October 1980, pages 27-30, <https://montgomeryplanning.org/wp-content/uploads/2016/09/PreservationAgricultureRuralOpenSpaceFunctionalMasterPlan1980ocr300.pdf>

⁵ *Functional Master Plan for the Preservation of Agriculture and Rural Open Space In Montgomery County*, October 1980, page 41, <https://montgomeryplanning.org/wp-content/uploads/2016/09/PreservationAgricultureRuralOpenSpaceFunctionalMasterPlan1980ocr300.pdf>.

⁶ While the Functional Plan identified the size of the Agricultural Reserve as approximately 110,000 acres, subsequent land use and zoning decisions have resulted in an Agricultural Reserve of about 90,000 acres.

⁷ *Ibid.*, page 12.

[B]ased upon the assumption that [agricultural] preservation is in the public interest and local government plays a critical role in the protection of that public interest. ... The preservation of farmland sustains a cultural landscape that is historically and immediately important to our society, it offers significant environmental values in the management of soil, water, and air resources of the region, it encourages an orderly form of development and the provision of public services in a logical and cost-effective manner, and it functions as an integral part of agricultural preservation activities within the entire region.⁸

The Functional Master Plan called for the establishment of a “Transfer of Development Rights (TDR) program” to be implemented in the Agricultural Reserve through the zoning process.⁹ The TDR program is a zoning mechanism that grants property owners in the Agricultural Reserve one development right for each five acres of land. These development rights can be sold (transferred) to landowners or developers who can use them to develop at a higher density in designated areas elsewhere in the County. As stated in the Functional Master Plan, “[B]y clustering residential uses away from farmland, TDR preserves a critical and irreplaceable natural resource while still allowing for needed housing.”¹⁰

A TDR is essentially a commodity that compensates landowners for the equity in their property that was reduced when the County downzoned the land from one dwelling unit per five acres to one dwelling unit per 25 acres. Landowners can sell their TDRs to developers who can use them to add additional density to a planned development not in the AR zone (above the density allowed under the zone being built in). As stated in the Functional Master Plan, the TDR program would serve “as a means of providing equity to farmers in the marketable value of their land while enabling them to continue to farm it.”¹¹

As described in Chapter 1, the newly created “Rural Density Transfer” (RDT) zone (now the AR zone) allowed a maximum density of one dwelling unit per 25 acres. The RDT zone was structured:

“[T]o promote agriculture as the primary land use in sections of the County designated in the General Plan by providing large areas of generally contiguous properties suitable for agricultural and related uses and permitting the transfer of development rights from properties in this zone to properties in designated receiving areas.”¹²

⁸ *Ibid.*, page 34.

⁹ A TDR program had previously been implemented in the Olney Planning Area. The Olney TDR program operated solely within the Olney Planning Area.

¹⁰ *Op. cit.*, *Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County*, page 41.

¹¹ *Ibid.*, page 110.

¹² *Ibid.*, page 84.

The Plan provides further justification for the TDR program and the rezoning of properties from the Rural Zone to the RDT zone:

“The TDR program allows farmland owners to sell their development rights and still retain the title to their land. The sale of development rights can help to finance capital improvements needed on the farm without carving small residential lots from the farm. This approach, unlike traditional zoning techniques, offers farmland owners an economic incentive to resist development pressure by allowing for the sale of development rights, thereby helping to preserve the farming activity as well as the land itself. Receiving areas are those areas where development rights are transferred to increase residential density. A developer must purchase development rights from a farmer in the Agricultural Reserve area, on the basis that one development right equals 5 acres of farmland. Remember that the additional units allowed in a receiving zone are being transferred from the Agricultural Reserve. They are units which could be built under the provisions of the Rural Zone at one dwelling per 5 acres. The TDR program simply shifts them from the Agricultural Reserve to designated receiving areas.”¹³

The TDR program complements other agricultural preservation programs, most notably the State’s Agricultural Land Preservation Program. The State program established Agricultural Preservation Districts in which certain farmland owners could voluntarily agree to sell a development right easement to the Maryland Agricultural Land Preservation Foundation. The sale of an easement provides a cash payment in exchange for relinquishment of the right to develop all or part of a property.

B. Agricultural Reserve Zone – Intent

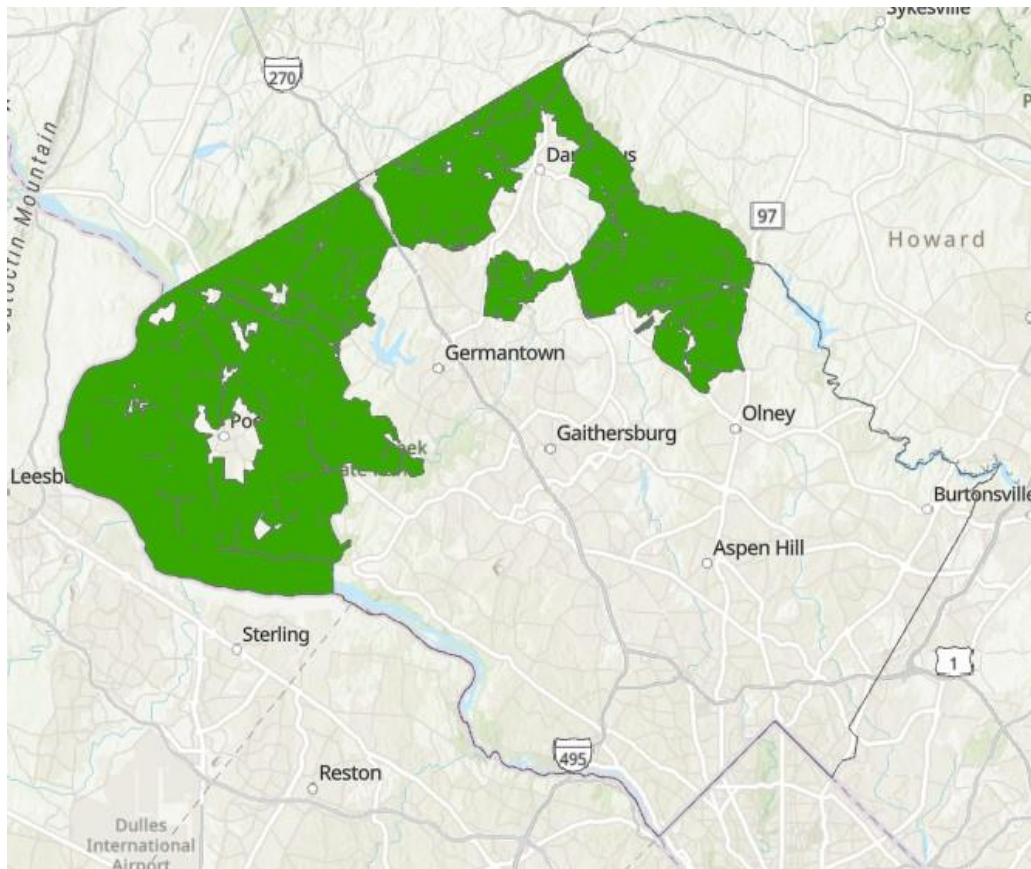
Note: In 2014, the Council approved a comprehensive rewrite of the County’s Zoning Ordinance. In the rewritten Zoning Ordinance, the former Rural Density Transfer (RDT) zone was renamed the Agricultural Reserve (AR) zone.

The County’s Zoning Ordinance delineates the intent and development standards for the AR zone. As stated in the Zoning Ordinance, “the intent of the AR zone is to promote agriculture as the primary land use in areas of the County designated for agricultural preservation... The AR zone accomplishes this intent by providing large areas of generally contiguous properties suitable for agricultural and related uses and permitting the transfer of development rights from properties in this zone to properties in designated receiving areas.”¹⁴ The map on the following page displays the location of AR zoned properties in the County.

¹³ *Ibid.*, page 43.

¹⁴ Montgomery County Zoning Ordinance, Article 59-4, Division 4.2, Section 4.2.1.A.1.

The Agricultural Reserve Zone



Source: ArcGIS Layer Maintained by the Planning Department

As detailed below, the Zoning Ordinance permits the creation of “child lots” under certain conditions in the AR zone. The stated intent of the child lot option is “to facilitate the continuation of the family farming unit and to otherwise meet the purposes of the AR zone.”¹⁵

C. Agricultural Reserve Zone – Development Standards

There are two types of zoning in Montgomery County: standard method and optional method. Every zone has a standard method of development that sets the limits for building in the zone (e.g., density limits, building height limits, etc.). Some zones also have an optional method of development that allows builders to receive extra density in their developments beyond what is set out in the standard method in exchange for the developer providing public amenities and facilities as part of the project.

Development in the AR zone may only occur under the standard method; optional method development does not exist in the AR zone. Standards in the AR zone include:

¹⁵ *Ibid.*, Section 4.2.1.A.3.

- Agricultural and limited residential and institutional uses are permitted;¹⁶
- The maximum permitted residential density is one lot per 25 acres;¹⁷
- Permitted structures include detached houses and buildings used for a cultural institution, religious assembly, or public use;¹⁸
- Properties may not be subdivided into small lots; buildings may not cover a large portion of a lot;¹⁹ and
- Residential uses must be located and arranged to support agriculture as the primary use and to support the rural character of the area.²⁰

In specific cases, a property in the AR zone may include more than one lot on 25 acres of land. The Zoning Ordinance permits the creation of “child lots” in the AR zone to allow the children of property owners to build a home on the family’s property. The Planning Board may approve no more than one child lot for each child of the property owner, regardless of the number of properties owned.²¹ The Zoning Ordinance requires that a child lot size be no larger than the minimum area necessary for approval of well and septic and may exceed three acres only when an on-site well and septic system is not feasible, and the lot cannot be served by a septic easement.²²

D. Montgomery County Demographics of Farm Principal Producers

The following table displays an analysis by the Office of Racial Equity and Social Justice (ORESJ) of data from the U.S. Department of Agriculture’s (USDA) 2017 Census of Agriculture for Montgomery County. These data include demographic information about “principal producers” for farms located in Montgomery County. The USDA defines “principal producers” as individuals who designate themselves as being involved in decisions regarding a farm.

The data may include some farms located outside of the AR zone and may exclude properties in the AR zone that are not classified by the USDA as “farms.” The total acreage of farmland shown in the table is less than the total acreage of the Agricultural Reserve. While imperfect, these data offer information about the population that may be eligible to create and sell development rights through the TDR and BLT programs.²³

¹⁶ *Ibid.*, Section 4.2.1.A.2.

¹⁷ *Ibid.*, Section 4.2.1.F.1.

¹⁸ *Ibid.*, Section 4.1.4.

¹⁹ *Ibid.*, Section 4.2.1.F.1.

²⁰ *Ibid.*, Section 4.2.1.C.

²¹ *Ibid.*, Section 4.2.1.E.2.A

²² *Ibid.*, Section 4.2.1.E.3.

²³ OLO finds these data more representative of the farm population in the Agricultural Reserve than census data that includes non-farmer residents.

Farms in Montgomery County by Demographics of Principal Producers, 2017

	# of Farms*	Land in Acres	Average Acres Per Farm
All Farms	558	65,537	117
Race or Ethnicity			
White	515	64,341	125
More than one race	20	500	25
Hispanic	17	833	49
Black	14	316	23
Asian	12	319	27
Native American/Alaska Native	4	110	28
Gender			
Male	363	57,397	158
Female	353	18,660	53
Time in operation			
New and beginning	147	12,512	85

Source: Tiffany Ward, Director of the Office of Racial Equity and Social Justice, to Jennifer Bryant, Director of the Office of Management and Budget, February 2, 2022, Office of Racial Equity and Social Justice, Racial Equity Impact Assessment (REIA) for Supplemental Appropriation #22 MCG-06.

* Each farm may have up to four principal producers, so numbers for each group do not add up to totals.

The USDA data indicate that in 2017:

- 92% of farms (515 of 558) had White principal producers;
- 98% of all farm acreage in Montgomery County had White principal producers; and
- Farms with White principal producers had about five times the average acreage of farms with Black principal producers (125 acres vs. 23 acres).

Overall, about 43% of Montgomery County residents are White.²⁴ As such, the population of residents eligible to participate in agricultural preservation programs does not reflect the diversity of the County. The ORESJ's analysis notes:

The history of structural racism in farming is complex and has far reaching impacts on who owns, accesses, and benefits from farmland,²⁵ with one scholar concluding “despite greater diversity in the U.S. population overall and seeming progress in other areas of racial equity, farming in this country appears to be as

²⁴ U.S. Census Bureau, 2020 Census Redistricting Data (Public Law 94-171), *Hispanic or Latino, and Not Hispanic or Latino by Race*, retrieved from <https://data.census.gov/cedsci/table?id=DEC%20Redistricting%20Data%20%28PL%2094-171%29&tid=DECENNIALPL2020.P2>

²⁵ Megan Horst. “Ongoing Impact of Racism on the U.S. Farming Landscape”. Civil Eats. January 25, 2019. Available at: <https://civileats.com/2019/01/25/new-research-explores-the-ongoing-impact-of-racism-on-the-u-s-farming-landscape/>

segregated as it was a century ago.”²⁶ The impacts of and lack of reparations for chattel slavery, the Homestead Acts and absence of similar reparations for Native Americans, along with the California Alien Land Law of 1913 cannot be understated.²⁷ These historical injustices along with inequities in education and the labor market have deeply impacted current racial disparities in wealth²⁸ and ownership of land and other assets. As a result, even as the agricultural industry faces challenges overall, farmers of color and women face unique barriers. In 2018, researchers found that farmers of color were more likely to be tenants than owners; they owned less land and smaller farms and generated less wealth from farming than their White counterparts.²⁹ Further complicating these barriers, at the federal level, are ongoing efforts³⁰ to rectify cases of discrimination³¹ in USDA programs.³²

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Jean Willoughby. “Envisioning Racial Equity in Agriculture”. Racial Equity Institute. April 2, 2019. Available at: <https://www.racialequityinstitute.com/blog/2019/4/2/envisioning-racial-equity-in-agriculture>

²⁹ *Op. cit.*, Horst (2019).

³⁰ Megan Boyanton. “Agriculture Equity Panel Takes on Racial Disparities in Farming”. Bloomberg Government. September 24, 2021. Available at: <https://about.bgov.com/news/agriculture-equity-panel-takes-on-racial-disparities-in-farming/>.

³¹ Congressional Research Service. “Racial Equity in Farming: Background in Brief”. November 19, 2021. Available at: <https://crsreports.congress.gov/product/pdf/R/R46969> and “The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers”. Available at: <https://www.everycrsreport.com/reports/RS20430.html>.

³² Tiffany Ward, Director of the Office of Racial Equity and Social Justice, to Jennifer Bryant, Director of the Office of Management and Budget, February 2, 2022, Office of Racial Equity and Social Justice, Racial Equity Impact Assessment (REIA) for Supplemental Appropriation #22 MCG-06.

Chapter 3. Transferable Development Rights Program

A Transferable Development Right (TDR) program permits landowners to sell development rights from their land to buyers who may use these rights to increase the density of development at another location. The land from which the development rights have been sold is permanently protected from future development through a conservation easement or a restrictive covenant included in the property record. Nationally, TDRs are most commonly employed as a tool to preserve agricultural land.

This chapter details the planning and zoning methods used to implement the TDR program in Montgomery County. In addition, the chapter presents data on the supply of, and the overlay zone receiving capacity for, TDRs in the County.

A. Transfer of Development Rights

Property owners in the AR zone may voluntarily transfer development rights from their property to residential developments outside of the Agricultural Reserve. To “create” a TDR, a property owner must grant a perpetual easement to Montgomery County. This easement is recorded in the County land records and severs that development right from the property. Property owners are not required to create TDRs.

A property owner may sell a single TDR for each five acres of land, minus one TDR for each existing dwelling unit on the AR zone property.³³ After creating a TDR, a property owner may hold that TDR or sell it to another party, who may hold, sell, or use the TDR to achieve increased residential density in a TDR overlay zone (see below). When a TDR is sold, a deed of transfer is recorded in the land records.³⁴ As described below, the buyer of a TDR may use the acquired development rights to increase density elsewhere in the County.

B. TDR Overlay Zone

Under its authority to decide zoning and land use matters in the County, the County Council has assigned a “base zone” to all land in the County. The Zoning Ordinance defines a base zone as “the mapped zone and accompanying development standards that apply to a property before the application of a floating or overlay zone.”³⁵

The Zoning Ordinance further authorizes the establishment of “overlay zones.” An overlay zone is defined as “a zone mapped over the underlying base zone that modifies the requirements of the underlying [base] zone.”³⁶ As part of the 2014 Zoning Ordinance rewrite, the County

³³ Montgomery County Zoning Ordinance, Section 4.2.1.D.1.a.

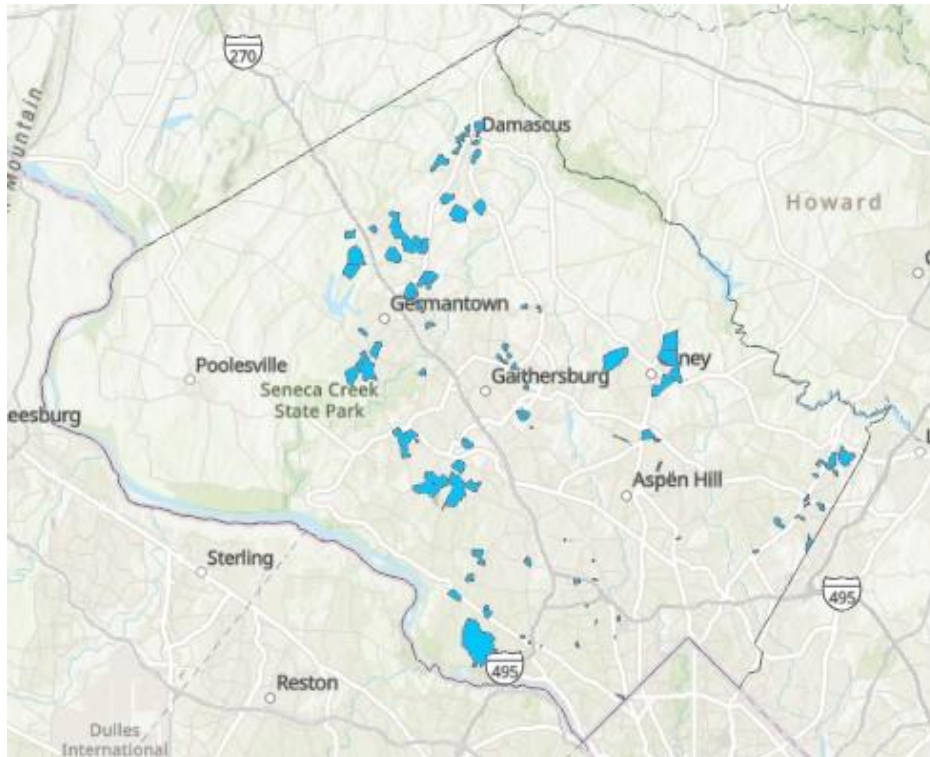
³⁴ *Ibid.*, Section 4.2.1.D.2.b. and Section 4.9.18B.1.c.

³⁵ *Ibid.* Section 1.4.2.

³⁶ *Ibid.*

created a Transferable Development Rights (TDR) overlay zone.³⁷ TDR overlay zones are located outside of the Agricultural Reserve. A developer building in an overlay zone can increase the residential density that would be allowed in the base zone by purchasing TDRs. Land may be designated as a TDR overlay zone when recommended by a master plan and approved by a Sectional Map or District Map Amendment.³⁸ Note that no master plan approved since 2012 has created a new TDR overlay zone on any property. The map below displays the location (in blue) of TDR overlay zones in the County.

TDR Overlay Zones as of February 2022



Source: ArcGIS Layer Maintained by the Planning Department

Owners of property in a TDR overlay zone have the option of developing their land under the standard method at the permitted residential density for the base zone or (with Planning Board approval) under the optional method³⁹ with additional residential density acquired through use of purchased TDRs.

³⁷ From 1981 through 2014, specific zones had alternative densities and development standards for optional method development with TDRs.

³⁸ *Op. cit.*, Montgomery County Zoning Ordinance, Section 4.9.1.B. Note: With the creation of the TDR overlay zone, County planning and land use documents no longer use the term, “TDR receiving area.”

³⁹ The Zoning Ordinance specifies the maximum development density and development standards for each zone. In certain zones, the Zoning Ordinance allow for optional method development which permits higher densities and modified development standards in exchange for public amenities (including use of the TDRs).

Recall that density in residential zones is measured by the number of dwelling units per acre. Density in commercial and mixed-use (a mix of commercial and residential) zones is measured by the floor area ratio (FAR).

The amount of additional residential density for a parcel that may be achieved through TDRs is specified in the area's master plan. The Zoning Ordinance sets the maximum TDR overlay zone density for specified residential base zones. TDR density increases range from 0.8 additional residential units per acre (an increase from 0.2 to 1.0 residential units in the Rural Neighborhood Cluster Zone) to an additional 57.5 residential units per acre (an increase from 43.5 to 100.0 units per acre in the R-10 zone).⁴⁰

In TDR overlay zones allowing mixed-use commercial/residential development, the governing master plan states a maximum residential FAR⁴¹ that may be built through the purchase of TDRs.⁴² Within these zones, each TDR purchased allows for construction of an additional 2,400 square feet of residential density within the development (except in a Metro Station Policy Area where each TDR purchased allows for construction of an additional 4,400 square feet of residential density).⁴³

For projects developed with Moderately Priced Dwelling Units (MPDUs), any density increase under the MPDU optional method is calculated after the base density of the property has been increased through use of TDRs.⁴⁴ In January 2022, the Council approved Zoning Text Amendment (ZTA) 21-01 that exempted developments in the Commercial Residential and Commercial Residential Town zones from base zone FAR limits (up to a maximum residential density of 2.5 FAR) if all of the residential units are MPDUs or other income-restricted units; the ZTA did not apply this exemption to CR and CRT properties in a TDR overlay zone.

Planning Department staff review development plans for compliance with TDR overlay zone requirements. Planning Department staff reports and Planning Board resolutions related to development projects specify the number of TDRs an applicant must acquire as a condition of site plan approval. The Planning Board further requires that record plats include full information on all TDRs used in a development.

C. TDRs in the Planning and Zoning Process

The *Thrive Montgomery 2050* plan is an update to the County's General Plan. The *Thrive* plan approved by the Council in October 2022 adopts the following policy objective:

⁴⁰ *Op. cit.*, Montgomery County Zoning Ordinance, Section 4.9.18.B.2.a.

⁴¹ The term "floor area ratio" refers to the ratio of gross floor area of a building to the area of the lot in which the building is located.

⁴² Montgomery County Zoning Ordinance, Section 4.9.18.B.3.a.

⁴³ *Ibid.*, Section 4.9.18.B.3.b.

⁴⁴ *Ibid.*, Section 4.9.18.B.1.d.

Preserve and enhance the Agricultural Reserve and manage it to maintain a rural pattern of development for the benefit of the entire County.

- Maintain agriculture as the primary land use in the Agricultural Reserve through policies, regulations, easements, and incentives, including those that maintain a critical mass of contiguous farmland.
- Maximize the benefits of the Agricultural Reserve through policies designed to ensure the continued viability of farming as an economically productive and sustainable activity, discourage sprawl, facilitate a broad range of outdoor recreation and tourism activities, conserve land and natural resources, and promote practices that advance environmental quality.
- Improve awareness of and access to the Agricultural Reserve for the public to experience and directly benefit from this valuable resource for locally grown food, outdoor recreation, and tourism.⁴⁵

Beyond the above policy statement, however, the *Thrive* plan does not set forth any recommendations regarding the future of the TDR program or the application of the TDR overlay zone to additional properties.

In preparing new master plans, the Planning Department and Planning Board consider whether any properties in the Planning Area are appropriate for TDR overlay zone designation. In all master plans, the Planning Department and Planning Board review many policy objectives in addition to agricultural preservation, including housing, economic development, transportation, and the environment. At times, policy objectives compete with one another. For example, a central element of the 2017 Bethesda Downtown Sector Plan, the new Bethesda overlay zone, provides mechanisms to expand affordable housing and open space, but does not address establishing additional demand for TDRs. Indeed, as stated above, no master plan approved since 2012 has created a new TDR overlay zone on any property.

D. TDRs and Agricultural Land Preservation Easements

In addition to the TDR program, five other County and State agricultural preservation programs operate in Montgomery County. Through each of these programs, the County or the State acquires easements aimed at preserving agriculture and open space in Montgomery County:

- The County's Agricultural Easement Program (AEP) allows the County Government to purchase agricultural land preservation easements, primarily (but not exclusively) on land in the Agricultural Reserve;

⁴⁵ *Thrive Montgomery 2050*, pages 44-45, October 25, 2022, https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/2022/Draft%20for%20Resolution%20-%20Thrive%202050%20clean%2010_17_22.pdf.

- The County's Building Lot Termination Program (BLT) is designed to permanently protect agricultural lands, especially where development potential is achievable through the approval of on-site waste disposal systems and is discussed in detail in Chapter 4;
- The Maryland Agricultural Land Preservation Foundation (MALPF) purchases development right easements from landowners to prevent development on agricultural land;
- The State's Rural Legacy Program (RLP) provides funding to protect large blocks of farmland and open space; and
- The Maryland Environmental Trust (MET) acquires land conservation easements through donations from landowners in exchange for reductions in income, property and estate taxes.

When the State acquires easements through the MALPF or MET, the property owner has no obligation to create or transfer to the County or the State TDRs associated with the land to which the easement applies. Property owners participating in the BLT program must create any "excess" TDRs associated with the property (as further described in Chapter 4) but may retain or sell those TDRs privately.

In contrast, the County's policy is to take title to "buildable TDRs" associated with properties participating in the County's AEP or the State's RLP programs. The term "buildable TDRs" refers to single TDRs retained for each 25 acres of land in the AR zone that may be used for construction of a single family detached housing unit. At present, the County policy is to not sell these TDRs so as to avoid entering into competition against private landowners who seek to sell their TDRs. Nonetheless, the Agricultural Land Preservation Easements project description form (project #P788911) acknowledges that the County may alter its policy in the future, and so states "these TDRs are an asset that the County may sell in the future, generating revenues for the Agricultural Land Preservation Fund."

E. Former Development Rights Bank

Before the Zoning Ordinance rewrite in 2014, the term "receiving area" was commonly used to refer to what are now called "TDR overlay zones" – the areas in the County where developers can receive additional density through the purchase of TDRs. The 1980 *Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County* called for creation of a "development rights fund or bank" to operate during an interim period after the establishment of the TDR program but before the County designated sufficient receiving areas to accommodate the supply of TDRs. As stated in the Functional Plan, "due to the fact that receiving areas will be identified through individual master plans, it may be desirable to create

a fund or bank to ensure the existence of an interim market for TDR's if a reasonable number of receiving areas are not available soon after the adoption of the sectional map amendment.”⁴⁶

In 1983, the Council amended the County Code to create a "Development Rights Fund." The intent of the Development Rights Fund was to “facilitate the establishment of a private market for development rights and to serve as a financial resource available when private commercial resources are not readily available at prevailing market rates.”⁴⁷ More specifically, the legislation authorized the establishment of a reserve fund to guarantee loans made by commercial lending institutions secured by development rights, and to directly purchase and sell development rights easements.⁴⁸ Intended as an interim measure to serve as a temporary safety net in case developers did not immediately purchase TDRs, the legislation creating the Development Rights Fund had a sunset provision to abolish the Fund in 1995. By 1995, the County deemed that sufficient demand for TDRs existed, and the Development Rights Fund was allowed to sunset.

F. Estimating TDR Supply and Receiving Capacity

The Planning Department provided OLO with data on all TDRs that have been created and their status (whether they have been used by a developer to increase density in a receiving area, have been transferred to the County, or have not yet been used). The Planning Department also provided an estimate of all potential TDRs that could be created. OLO compared data provided by the Planning Department to publicly available land records and to lists maintained by the Office of Agriculture of TDRs transferred to the County.

OLO also discussed with the Planning Department how to estimate TDR overlay zone receiving capacity to assess how many more TDRs the existing TDR overlay zones could absorb. Section H below describes the Planning Department’s process for developing past estimates of receiving capacity for TDRs. Given the complexity of that process, OLO determined that conducting a new TDR receiving capacity analysis would not be possible as part of this study. In addition, past estimates of TDR overlay zone receiving capacity developed by Planning Department staff remain relevant. As such, this chapter describes the most recent estimate of TDR overlay zone receiving capacity, from 2016, and how receiving capacity may have changed since then.

G. TDR Sending Area Supply

The total potential TDR supply refers to the number of TDRs that have been created as well as TDRs that might be created in the future. In addition, the supply of TDRs decreases when a developer uses TDRs to achieve increased density in a TDR overlay zone and when a property owner transfers TDRs to the County as part of an agreement related to an agricultural easement program. The table below summarizes TDR sending area supply based on the

⁴⁶ *Functional Master Plan for the Preservation of Agriculture and Rural Open Space In Montgomery County*, October 1980, page 46.

⁴⁷ Montgomery County Code, Chapter 13-A-4, **removed from the County Code on October 29, 1995**.

⁴⁸ *Ibid*.

Planning Department's estimate of total potential TDR supply and OLO's analysis of data provided by the Planning Department and the Office of Agriculture.

Summary of TDR Supply as of February 2022

Category of TDRs	# of TDRs
a. Total Potential TDR Supply	13,597
b. TDRs Created by Landowners	– 10,381
c. TDRs Not Yet Created (a-b)	3,216
d. TDRs Created by Landowners	10,381
e. Used TDRs – by developers for additional density	– 7,884
f. Used TDRs – bought by the County through agricultural easement programs	– 1,148
g. TDRs Created by Landowners but Not Yet Used (a-e-f)	1,349
h. Total TDRs That Could Be Used in the Future (c+g)	4,565

Sources: Planning Department estimates and OLO analysis of Planning Department and OAG data and land records.

As shown in the table above, the Planning Department currently estimates a total potential TDR supply of 13,597 TDRs (see the Appendix for a detailed explanation of this estimate). Of those, 10,381 TDRs have already been created, or severed through easement, while the remaining 3,216 potential TDRs have not yet been created (item c in the table above).

Of the 10,381 TDRs that have already been created, data show that 7,884 have been recorded on a subdivision plat, meaning they have already been used in the TDR overlay zones. In addition, Montgomery County holds 1,148 TDRs. Current County policy is not to market these TDRs so as to avoid entering into competition against private landowners who seek to sell their TDRs, and the Planning Department does not consider them to be available for use. Therefore, out of the 10,381 TDRs that have been created by landowners, 1,349 remain that are privately held and have not been used.

The sum of potential TDRs not yet created (3,216 - line c above) and TDRs created but not yet used (1,349 - line g above) is 4,565 TDRs (line h above). This represents the total remaining supply of TDRs that could be available for future use for development in the TDR overlay zones. However, OLO offers three caveats to these estimates:

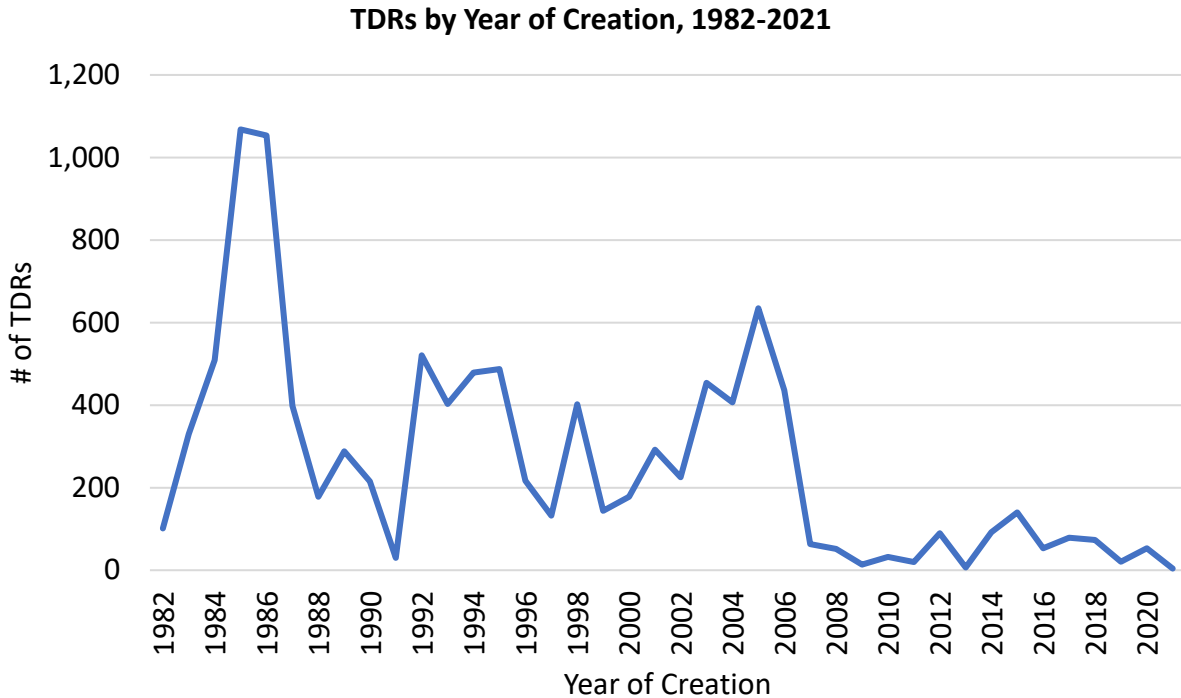
- Planning Department staff estimated a total TDR supply of 13,597 in 2022 (used in the calculations above) based on a new analysis (see Appendix) that differs significantly from the previous estimate of approximately 10,900 TDRs;

- Some property owners that *have not* yet created TDRs may never create or sell their TDRs, meaning that not all of the estimated 3,216 potential TDRs (line c in the table above) would be available to use for development; and
- Inaccuracies in the underlying data on TDRs that *have* been created may exist (see below).

Data accuracy. To develop the estimates in the table on the previous page, OLO compared data provided by the Planning Department to lists maintained by the Office of Agriculture of TDRs transferred to the County and to publicly available land records. While OLO did not audit all of the data used to estimate the number of TDRs by category, we reviewed land records for nearly 700 TDRs created since 2010. OLO found multiple discrepancies and inaccuracies in the data provided by different County agencies.

The table reflects corrections to the data made by OLO as a result of its analysis of County land records. However, OLO was unable to review land records for all 10,381 TDRs within the scope of this study, and therefore additional inaccuracies may exist and be reflected in the table. Of note, in Fiscal Year 2007, the County Council directed the Planning Department to develop and maintain a record of TDRs that would show statistics about TDR supply and use of TDRs. However, OLO's analysis suggests that the existing system for tracking TDRs requires review and improvement to ensure accuracy.

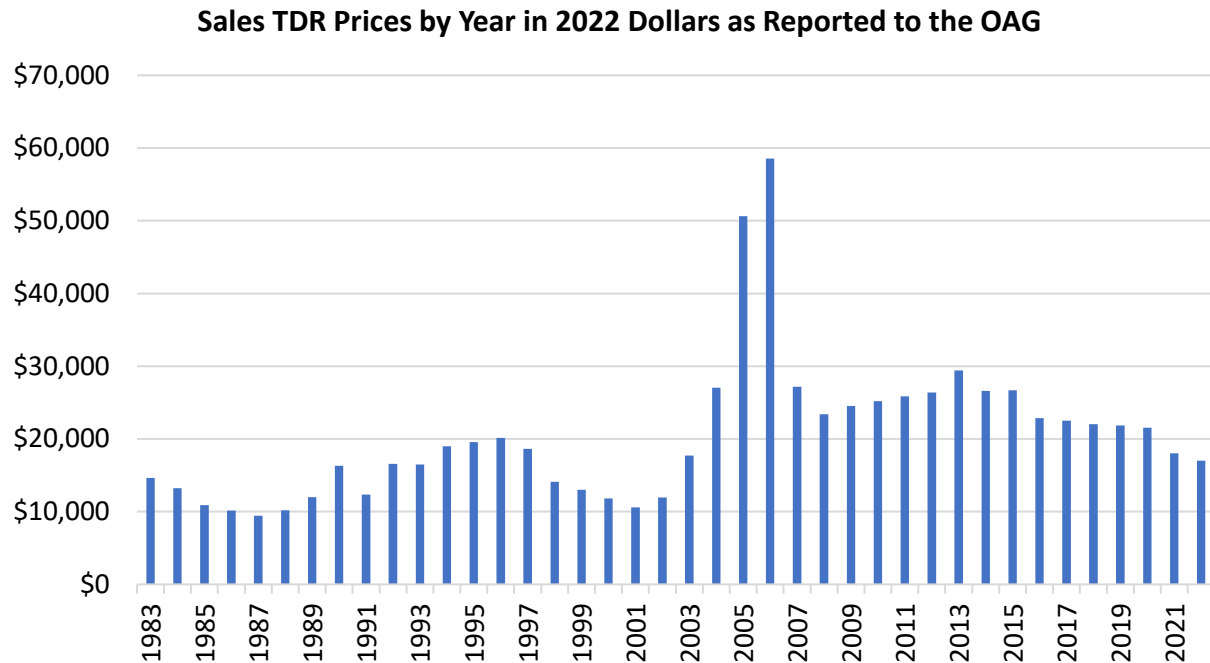
Trends in the creation of TDRs. The TDR program has been in existence for 40 years. The data provided by the Planning Department includes the date that each TDR was created. The chart below displays the number of TDRs created by year. The chart shows that the creation of TDRs peaked in 1985, shortly after the creation of the TDR program. The chart also shows a steep decrease in the creation of TDRs after 2006. From 1982 to 2006, an average of 383 TDRs were created every year. However, from 2007 to 2021, property owners created an average of 53 TDRs per year.



Source: OLO analysis of Planning Department Data

Trends in TDR prices. Comprehensive data on sales prices of TDRs are not available. Occasionally, the deed of transfer (the legal document used to transfer ownership) lists the sales price. OLO reviewed land records for a random sample of 100 TDRs and found 12 TDRs, reflecting sales in seven different years, with prices listed in the deeds of transfer. In addition, Office of Agriculture staff provided OLO with data they gathered from informal conversations with property owners in the Agricultural Reserve regarding the prices at which they sold their TDRs. The price data provided by OAG are broadly consistent with the data OLO gathered from land records, and also more comprehensive.

The chart on the following page displays the data provided by OAG staff, adjusted for inflation by OLO staff. OLO cautions that the data presented below reflect information provided by a small number of property owners in an informal context, and OLO could not verify price data for every year. The chart shows TDR prices peaked in 2006, at about \$59,000 (in 2022 dollars). The data also show recent sales prices are similar to prices in the 1990s (in 2022 dollars).



Sources: Montgomery County Office of Agriculture and U.S. Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Arlington-Alexandria (January), retrieved from the U.S. Bureau of Labor Statistics, <https://data.bls.gov/cgi-bin/surveymost>

H. TDR Overlay Zone Receiving Capacity

As noted above, developers can use TDRs in County-designated TDR overlay zones in order to achieve increased density. Planning Department staff estimated the TDR overlay zone receiving capacity, meaning the number of TDRs that the TDR overlay zones can receive, in 1997, 2005, 2007, 2012 and 2016.

Estimating TDR overlay zone receiving capacity is a complex process that involves a property-by-property analysis and requires extensive time and Planning staff expertise. Furthermore, no new TDR overlay zones have been created since 2012. This section describes the 2016 estimate of TDR overlay zone receiving capacity and how much it may have changed between 2016 and 2021.

Methodology for estimating TDR overlay zone receiving capacity. Estimating TDR overlay zone receiving capacity involves examining three elements:

- The total number of TDRs that could be used in each TDR overlay zone;
- The number of TDRs that have already been used; and
- “Diminished capacity,” meaning the reduction in receiving capacity in a TDR overlay zone because existing development did not use the maximum number of TDRs that could have been used.

Planning Department staff estimated TDR overlay zone receiving capacity in 2016 by reviewing each approved preliminary plan within each TDR overlay zone in addition to properties in the overlay zones not covered by a preliminary plan. For each approved preliminary plan, staff calculated the number of TDRs shown in land records as well as the number of “forgone” TDRs, that is, the difference between the maximum number of TDRs that could be used and the number of TDRs that were used. For each property not covered by preliminary plans, Planning staff assessed the potential for future use of TDRs through development. This 2016 exercise required a significant amount of Planning staff time and relied on staff expertise to assess the potential for future use of TDRs.

TDR overlay zone receiving capacity estimate. Based on the above analysis, Planning Department staff estimated in 2016 that the remaining TDR overlay zone receiving capacity for TDRs was 2,775. However, Planning Department staff have found developers rarely use more than 60% of the maximum number of TDRs for any given project. Based on historical experience, Planning Department staff adjusted TDR overlay zone receiving capacity to 1,665 TDRs (60% of 2,775) to reflect the maximum probable future use of TDRs.

The 2016 analysis accounted for a total of 7,185 TDRs that had already been recorded on a subdivision plat. As previously noted, OLO has identified 7,884 TDRs used by developers as of February 2022, or 699 more than the Planning Department’s 2016 calculation. Subtracting these additional 699 TDRs the 2016 estimated capacity of 1,665 TDRs leaves a capacity of 966 TDRs based on maximum estimated future use of TDRs.

I. Comparison of Supply of and TDR Overlay Zone Receiving Capacity for TDRs

As stated above in Section G, OLO’s analysis shows 1,349 TDRs that have been created but have not yet been used. As noted above, OLO estimates that current TDR overlay zones receiving capacity in the County is roughly 966 TDRs. The County would need to create receiving capacity for about 400 additional TDRs to assure a market for each currently existing TDR. However, Planning Department staff also estimate that landowners in the AR zone could create up to 3,216 additional TDRs in the future. Property owners may choose not to create the TDRs. However, if property owners do choose to create all potential TDRs, the remaining TDR supply would equal 4,565 TDRs (created TDRs plus potential TDRs). In this scenario, total TDR supply would represent about four-and-a-half times the maximum current receiving capacity in the TDR overlay zones.

Chapter 4. Building Lot Termination Program

Montgomery County established a building lot termination (BLT) program in 2008. As defined by the County Code, “a building lot termination easement is a form of agricultural easement that generally terminates remaining development rights by extinguishing the right to build a dwelling unit on an eligible buildable lot.”⁴⁹ Through the BLT program, landowners who demonstrate that their land is capable of residential development may receive compensation in exchange for agreeing to forgo residential and other types of development on their land. The County Code states the purpose of the BLT program is “to preserve remaining farmland in, prevent the further fragmentation of, and minimize residential use of the Agricultural Reserve.”⁵⁰

This chapter describes the origin of the BLT program in Montgomery County and details the planning and zoning methods used to implement the program. In addition, the chapter presents data related to the BLT program.

Note: Use of the terms “BLT” and “BLT easement”

In this report, the term “BLT” refers to a real property asset associated with properties located in the Agricultural Reserve. A landowner may sever this asset from the property and sell it to a developer to add density to a development outside the Agricultural Reserve.

The term “BLT easement” refers to the covenant included in land records that restricts the uses permitted on the property.

A. Origin of the Montgomery County BLT Program

Prior to 2007, Maryland law restricted the purchase of agricultural preservation easements using State funds to land that was located within a State recognized agricultural preservation district. State agricultural preservation districts were formed when landowners voluntarily agreed to maintain their land in agricultural use for a specified period of time. Landowners in an agricultural preservation district could further agree to sell a perpetual development rights easement on that property to the Maryland Agricultural Land Preservation Foundation (MALPF). In practice, however, few property owners in the State agreed to sell their development rights as part of this program.

In 2007, the General Assembly repealed the prohibition on the purchase of agricultural easements outside of State recognized agricultural districts. Most notably, the legislation also permitted counties to create their own agricultural preservation programs (such as the BLT program) that could purchase easements with a combination of State and local resources.

⁴⁹ Montgomery County Code, Article 4, Section 2.B-15(a).

⁵⁰ *Ibid.*, Section 2.B-15(b).

Concurrent with the General Assembly's revision of State agricultural preservation rules, government officials and residents of Montgomery County were considering modifications to the County's agricultural preservation efforts to address the issue of the "buildable" TDR. The term "buildable" TDR refers to the single TDR retained for each 25 acres of land in the AR zone that may be used for construction of a single family detached housing unit. The remaining four TDRs per 25 acres may be referred to as "excess TDRs" because the property owner cannot build on the land but can only sell the development rights to add density to a receiving area elsewhere in the County. In the 1990s, concern arose about the viability of farming in the Agricultural Reserve as multiple properties were developed with a single home on 25 acres with little active agricultural use of the land. As described by former Planning Board Chair, Royce Hanson:

"When the [Agricultural] Reserve was created in 1981, planners expected landowners to sell four of the five development rights for each 25 acres and retain one for an existing or future farmhouse. They did not anticipate emergence of a robust market in land with buildable rights to construct ostentatious exurban homes in a pastoral landscape. By the late 1990s, it was apparent that the "fifth" or "buildable" development right was far more valuable than the four "excess" rights. Country buildable lot prices ranged from \$300,000 to \$750,000, many times the agricultural value of a 25-acre parcel with no retained development right. Such prices virtually precluded new farmers from buying land and proliferation of McMansions generated a serious long-term threat to the Reserve's rural character and to fragmenting the critical mass of a working landscape."⁵¹

In the mid-2000s, staff in the County's Department of Economic Development (DED)⁵² as well as other stakeholders began to develop proposals to address fragmentation of the Agricultural Reserve. In 2006, the County Council created the Ad Hoc Agricultural Policy Working Group to "provide comprehensive advice on ways to ensure the long-term protection of the Agricultural Reserve and preservation of the agricultural industry."⁵³ The Council charged the Working Group with several tasks including undertaking "a thorough review of pending and potential legislation concerning the Rural Density Transfer zone, the child lot program, the proposed Building Lot Termination program..."⁵⁴

In January 2007, the Working Group issued its final report. The Working Group recommended the County create a Building Lot Termination (BLT) easement program as a tool to preserve farming and prevent fragmentation of the Agricultural Reserve and to provide compensation to

⁵¹ Hanson, Royce, *Suburb, Planning Politics and the Public Interest*, Cornell University Press, 2017, page 154.

⁵² Prior to 2015, the County's Agricultural Services program was not a separate Office but a division within the then Department of Economic Development.

⁵³ The 15-member Ad Hoc Agricultural Policy Working Group consisted of Agricultural Reserve farmers and property owners, former elected officials, representatives of organizations, and other County residents.

⁵⁴ Final Report of the Ad Hoc Agricultural Policy Working Group, Montgomery County, Maryland, January 2007, page 2, https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/doc/aggroup_finalreport.pdf

property owners in exchange for foregoing development of buildable TDRs. As the Working Group stated in the final report:

“Simply put, these unused lots, along with the retained TDRs and approved septic fields that make them viable as building lots, should be eliminated for future development by the execution of an agricultural easement on the land on which the lots or potential lots are located. The landowner would be paid fair compensation for the termination of the lot(s).”⁵⁵

The Working Group recommended that compensation for a BLT should be set annually based on a percentage of the fair market value of a buildable lot in the RDT zone (the current AR zone) as determined by recent appraisals. The Working Group further recommended funding the purchase of BLTs both with County Government resources as well as through a private market for buildable TDR development rights.⁵⁶

In response to the changes in State law, the work of the DED Division of Agricultural Services, and the recommendations of the Ad Hoc Agricultural Policy Working Group, then-County Executive Leggett proposed legislation that would rewrite Chapter 2B (Agricultural Land Preservation) of the County Code. The Council approved the legislation, which authorized the County to purchase both State and County agricultural land preservation easements and established the County’s BLT program.

The rules governing the County’s BLT program are set forth in the County Code and in County regulations as detailed in the following sections of this chapter.

B. Creation and Duration of BLT Easements

The County Code requires three conditions for the creation of a BLT easement. A BLT easement may be applied to a buildable lot that is:

- Located in the Rural Density Transfer zone (the current AR zone);⁵⁷
- Zoned for residential density no higher than one dwelling unit per 25 acres; and
- Capable of being served by an individual sewage treatment unit that conforms with applicable County laws and regulations.⁵⁸

⁵⁵ Ibid., page 33.

⁵⁶ Ibid., pages 35-37.

⁵⁷ The Rural Density Transfer zone was renamed the Agricultural Reserve (AR) zone as part of the 2014 Zoning Ordinance rewrite.

⁵⁸ Montgomery County Code, Chapter 2B, Article 4, Section 2.B-16(b).

In addition, to be eligible to create a BLT, a landowner must create any remaining TDRs associated with the property.⁵⁹ AR zone child lots are not eligible for the BLT program.⁶⁰ Once a BLT is created, the easement is permanent, it cannot expire or be terminated.⁶¹

C. Use of Property under a BLT Easement

County regulations permit use of land under a BLT easement for agriculture, operation of agricultural machinery, processing of agricultural products, and operation of a farm market.⁶² The regulations do not permit residential uses on land with a BLT easement except when a reserved residential lot is retained with the easement.⁶³ In addition, the termination of residential development rights through a BLT easement further requires the property owner to relinquish the right to develop an individual on-site sewage waste disposal system needed to support a residential dwelling unit.⁶⁴ However, land under a BLT easement may contain non-residential accessory agricultural uses and structures.⁶⁵

A property owner may not subdivide land under a BLT easement, nor may the land be used for most residential, commercial, or industrial purposes.⁶⁶

D. Use of BLTs to Increase Development Density

Unlike the TDR program, the BLT program does not require master plan identification of an overlay zone receiving area to establish where the purchase of BLTs may be used to increase density. Rather, the use of a BLT to increase permitted density applies to specific properties based on the base zoning for the site.

The Zoning Ordinance defines the method by which the Planning Board may grant density increases under the optional method in exchange for the developer providing certain public benefits.⁶⁷ Purchase of BLTs is one of the public benefits specified in the Zoning Ordinance for certain zones. The Zoning Ordinance requires the purchase of BLTs, or an equivalent payment to the Agricultural Land Preservation Fund (ALPF),⁶⁸ for optional method development in two

⁵⁹ Code of Montgomery County Regulations, Chapter 2B.00.01.04., Section F.1.

⁶⁰ *Ibid.*, Section A.1.

⁶¹ *Ibid.*, Section 2.B-16(f).

⁶² Code of Montgomery County Regulations, Chapter 2B.00.01.02., Section D.1.

⁶³ Code of Montgomery County Regulations, Chapter 2B.00.01.04., Section C.2.a. The term “reserved residential lot” refers to a lot within a recorded easement that has received approval from the County’s Agricultural Preservation Advisory Board to be reserved for a single-family home.

⁶⁴ Code of Montgomery County Regulations, Chapter 2B.00.01.04., Section C.2.d.

⁶⁵ Montgomery County Code, Article 4, Section 2.B-16(f)(3).

⁶⁶ Code of Montgomery County Regulations, Chapter 2B.00.01.04., Section C.3.

⁶⁷ The Zoning Ordinance specifies the maximum development density and development standards for each zone. In certain zones, the Zoning Ordinance allow for optional method development which permits higher densities and modified development standards in exchange for public amenities (including use of the BLTs).

⁶⁸ The Agricultural Land Preservation Fund is an existing special, non-lapsing revolving fund used to

zones (the Commercial Residential and the Life Sciences Center zones) and permits discretionary use of BLTs to increase density for the optional method development in two other zones (the Commercial Residential Town and the Employment Office zones).

The Commercial Residential (CR) zone is intended for urban centers with transit access and a variety of housing, services, and amenities.⁶⁹ Development in the CR zone may occur either under the standard or optional method. Development under the optional method allows for additional density through provision of public benefits, including the purchase of BLTs.

In the CR zone, a developer may accrue public benefit points through the purchase of BLTs (or payments to the ALPF) in an amount equal to 7.5% of the incentive density floor area.⁷⁰ The developer must purchase one BLT (or make an equivalent ALPF payment) for every 31,500 square feet of gross floor area comprising the 7.5% incentive density floor area. Purchase of additional BLTs (or ALPF payments) may be made for any incentive density above 7.5% within the maximum density limits of the CR zone.⁷¹

The Life Sciences Center (LSC) zone is intended primarily for research, development, education, and related activities. The primary purpose of this zone is to promote research, academic, and clinical facilities that advance the life sciences, health care services, and applied technologies.⁷² Development in the LSC zone may occur either under the standard or optional method. Development under the optional method allows for additional density through provision of public benefits, including purchase of BLTs according to a formula specified in the Zoning Ordinance.

For BLT purchases required for optional method development in the CR and LSC zones, the developer must purchase private BLTs in whole units. At times, a developer seeks a density increase that is less than what would be received through the purchase of a single BLT. In such cases, the developer may achieve the additional density through a contribution to the County ALPF of an amount determined by the Planning Board for a “partial BLT.” Developer contributions to the ALPF provide resources for the County to acquire future agricultural land preservation easements or to otherwise support County agricultural services (see next section).

In the Commercial Residential Town (CRT) and the Employment Office (EOF) zones, a developer may voluntarily purchase BLTs (or make payment to the ALPF) to increase density under the optional method.⁷³ At times, a developer seeks a density increase that is less than what would

purchase property interests, such as an agricultural easement, to preserve agricultural land in the County.

⁶⁹ M-NCPPC, *Commercial Residential Zones*, <https://montgomeryplanning.org/development/zoning/commercial-residential-zones/>.

⁷⁰ The term, “incentive density floor area” refers to the additional amount of building floor area achieved through provision of public benefits.

⁷¹ Montgomery County Zoning Ordinance, Article 59-4, Division 4.7, Section 4.7.3.F.1.a.

⁷² M-NCPPC website, Zoning Montgomery, Life Sciences Center, http://www.montgomeryplanning.org/development/zoning/documents/LSC_2.12.13.pdf.

⁷³ Montgomery County Zoning Ordinance, Article 59-4, Division 4.7, Section 4.7.3.F.1.c.

be received through the purchase of a single BLT. In such cases, the developer may achieve the additional density through a purchase of a “partial BLT” for an amount determined by the Planning Board. The proceeds from the purchase of partial BLTs fund ALPF acquisition of future agricultural land preservation easements (see next section).

Planning Department staff review development plans for compliance with BLT requirements. Planning Department staff reports and Planning Board site plan resolutions specify the number of BLTs an applicant must acquire as a condition of site plan approval. Planning Board site plan resolutions further stipulate that the developer must provide proof of purchase of the requisite number of BLTs before the County Department of Permitting Services issues building permit(s) for the development.

E. County Purchase of BLTs

The County Code authorizes the County to purchase agricultural easements including acquired BLTs.⁷⁴ The rules and requirements for County purchase of an agricultural easement are delineated in County regulations. The Code of Montgomery County Regulations applies standards for County purchase of BLTs that do not apply to private BLT purchases. The regulations restrict County purchase of BLTs to properties in the AR zone that are at least 50 acres in size.⁷⁵ In addition, to be eligible for a County BLT purchase, at least 50 percent of the property must be classified to meet certain USDA soil or woodland standards.⁷⁶ Child lots in the AR zone are not eligible for County BLT purchase.⁷⁷

County regulations set forth a detailed application and review process for County purchases of BLTs, subject to available funding. The regulations define a formula for ranking competing BLT easement applications based on a series of criteria including property size, soil quality, tenure of land in agricultural use, number of BLT easements, contiguousness to other easements, and subdivision status.⁷⁸

A landowner who applies for County purchase of a BLT must submit an asking price for the easement. The amount the County will pay for the BLT is determined through the calculation of the “base value,” “added value,” and “maximum value.” As stipulated in County regulations, the County Executive must determine the BLT base value, added value, and maximum value by July 1 of each year. The base value is the lowest price the County will pay for a BLT and is established in consideration of factors such as recent prices paid for agricultural easements, recent TDR prices, recent fair market value prices for agricultural land.⁷⁹

⁷⁴ Montgomery County Code, Article 4, Section 2.B-7(d)(1).

⁷⁵ Code of Montgomery County Regulations, Chapter 2B.00.01.04., Section A.2.a. County regulations also permit County purchase of a BLT on a property of less than 50 acres if that property is contiguous to other lands protected from development by State or County agricultural and conservation easements.

⁷⁶ *Ibid.*, Chapter 2B.00.01.04., Section A.2.b.

⁷⁷ *Ibid.*, Chapter 2B.00.01.04., Section A.1.

⁷⁸ *Ibid.*, Chapter 2B.00.01.04., Section B.

⁷⁹ *Ibid.*, Chapter 2B.00.01.04., Section D.1.

The BLT added value is a range of dollar amounts based on 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. Added value characteristics include property size, land and soil quality, tenure of land in agricultural use, road frontage, and location near the edge of the Agricultural Reserve.⁸⁰ The maximum value is the highest price the County will pay for a BLT and equals the sum of the base and added values. The price the County will pay for a BLT may not exceed the current BLT maximum value.⁸¹

The County Executive last established BLT easement values in Fiscal Year 2014 with the base value set at \$222,390 (\$257,407 in 2022 dollars), with an added value up to \$31,770, and a maximum value of \$254,160 (\$294,179 in 2022 dollars).⁸² These BLT easement values remain in effect. Executive Branch staff informed OLO that one reason for not updating the Executive Order establish BLT values is that the County has not identified an on-going funding source for public purchases of BLTs.

The County established the Agricultural Land Preservation Fund (ALPF) as a special, non-lapsing revolving fund for agricultural land preservation purposes.⁸³ The County may use ALPF resources to purchase agricultural easements, including BLT easements. From the inception of the BLT program through Fiscal Year 2016, the County funded the purchase of BLTs through a variety of revenue sources including Agricultural Transfer Tax revenues, developer payments, and State aid. Most notably, the fund received a one-time infusion of \$5 million from the M-NCPPC Advance Land Acquisition Revolving Fund (ALARF) in 2009 to fund County purchases of agricultural preservation easements. However, the one-time 2009 ALARF contribution has not been replicated since and all on-going agricultural preservation funding sources generate relatively small amounts of revenue.

From Fiscal Years 2017 through 2022, the Capital Improvements Program (CIP) project description form (PDF) for Agricultural Land Preservation Easements (CIP project #P788911) stated that “the traditional funding sources for this project are no longer sustainable.” While the above language does not appear in approved Fiscal Years 2023-2028 CIP, the PDF funding schedule does not anticipate a significant inflow of new resources nor does the CIP identify any alternative funding sources for purchase of agricultural easements, including BLTs. The County has not purchased any BLTs since Fiscal Year 2016. The PDF states that “easement acquisition opportunities will be considered on a case-by-case approach while alternative funding sources are identified.”

⁸⁰ *Ibid.*, Chapter 2B.00.01.02., Section F.2.

⁸¹ *Ibid.*, Chapter 2B.00.01.04., Section D.1.b.

⁸² Executive Order 137-13, July 29, 2013, <https://www.montgomerycountymd.gov/exec/Resources/Files/137-13.pdf>.

⁸³ Montgomery County Code, Article 4, Section 2.B-9(a).

F. BLT Creation, Disposition, and Price Data

Data on the supply of BLTs are more limited than for TDRs. Furthermore, Planning Department staff have concluded that BLT receiving capacity cannot be reasonably estimated and data on the demand (that is, receiving capacity) for BLTs are not available. This section describes available data on past and current supply of BLTs and the challenges associated with developing an estimate of BLT receiving area capacity.

Section B of this chapter describes the requirements for creating a BLT easement. Comprehensive data on which properties would meet BLT eligibility requirements are not available, and as such, no precise estimates of the maximum number of potential BLTs can be calculated.⁸⁴ Office of Agriculture staff roughly estimate the Agricultural Reserve Zone could theoretically produce about 1,000 BLTs. However, any given property owner may choose not to create a BLT in order to retain the ability to build or maintain a dwelling unit on their property.

Planning Department and Office of Agriculture staff each provided OLO with data on BLTs that have been created to date. In the table below, the term:

- “Private BLT” means a private party purchased the BLT and used it;
- “Public BLT” means the BLT was transferred to Montgomery County; and
- “BLTs created, not yet used” means the Planning Department does not have a record of the BLT being used.

OLO compared BLT data provided by the Planning Department to data provided by the Office of Agriculture and government land records and identified some inconsistencies. The table below incorporates corrections made as a result of this analysis. The data in the table below does not include information on BLTs in the development pipeline, that is, BLTs required in plans approved by the Planning Board that have not yet been purchased by developers.

⁸⁴ For example, one BLT eligibility criterion requires that the property test the property’s soils to certify the soils sufficiently percolate to accommodate a residential septic system. Soil conditions may vary greater from property to property. Therefore, absent testing of every property otherwise potentially eligible for a BLT easement, it is unknowable how many AR zoned properties would meet the percolation requirement.

Summary of All BLTs Created as of February 2022

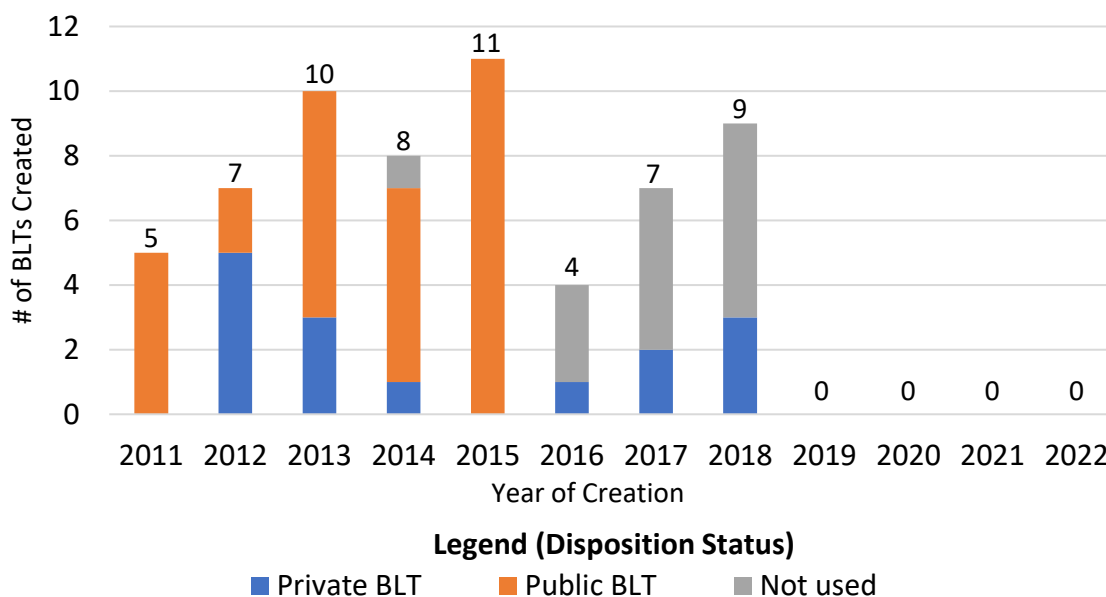
	#	% of Total
Public BLTs (transferred to Montgomery County)	30	39%
Private BLTs (purchased by private party and used)	16	25%
BLTs created, not yet used	15	36%
Total BLTs Created as of February 2022	61	100%

Trends in the creation of BLTs over time. The chart below displays numbers of BLTs by their year of creation, and their disposition status as of February 2022. The chart shows that:

- Between four and eleven BLTs were created each year between 2011 and 2018;
- No BLTs have been created since 2018; and
- The majority of BLTs created between 2016 to 2018 have not yet been used according to Planning Department records.

It is important to note that the disposition status refers to the status to date. A property owner may create a BLT in one year and sell it to a private party or to Montgomery County in a subsequent year. For example, the single private BLT displayed in the chart below for 2016 was created in 2016 but was sold in 2020. In contrast, the table in the following section shows that BLT in 2020 because that was the year in which it was sold.

**Number of BLTs by Year of Creation (as of February 2022)
and Disposition Status (to date)**



BLT Prices. OLO reviewed land records for each of the 61 BLTs that have been created since 2011 and price data for public BLTs provided by the Office of Agriculture. OLO found price data in land records and/or OAG records for 42 BLTs, including all 30 public BLTs and 12 out of 16 private BLTs. The table below displays the numbers of public and private BLTs and average prices by year of creation. The data show that BLTs sold most recently (in 2018 and 2020) were sold at lower prices than those sold in 2015 and prior years. However, because price data are available for only three BLTs sold in 2018 and 2020, it is difficult to draw conclusions from these data.

Average BLT Prices by Year of Transfer, in 2022 Dollars

Year of Transfer	Public BLTs		Private BLTs	
	#	Average Price	#	Average Price
2011	1	\$286,345	0	
2012	6	\$304,378	5	\$282,067
2013	7	\$296,781	2	\$287,887
2014	12	\$284,355	1	\$283,577
2015	4	\$281,937	1	\$261,010
2016	0		0	
2017	0		0	
2018	0		5*	\$225,844
2019	0		1	-
2020	0		1	\$199,057
Total/Average	30	\$291,003	16	\$265,120

* Price data were only available for two out of the five private BLTs transferred in 2018. Price data were not available for the private BLT that was transferred in 2019.

Sources: OLO analysis of OAG records and land records, and U.S. Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Arlington-Alexandria (January), retrieved from the U.S. Bureau of Labor Statistics, <https://data.bls.gov/cgi-bin/surveymost>

G. Partial BLTs

Note: Distinction between “Whole BLTs” and “Partial BLTs”

Up until this point, this report used the term “BLT” to refer to a real property asset that a landowner may be severed from the zoned property and sold to a developer to add density to a development outside the Agricultural Reserve. As landowners cannot sell a fraction of a BLT, the remainder of this chapter will refer to a BLT created from AR zoned property as a “whole BLT.”

In contrast, the term “partial BLT” refers to a developer contribution to the County’s Agricultural Land Preservation Fund to achieve additional density in an optional method development in certain zones outside of the Agricultural Reserve. As explained below, partial BLTs are measured as a portion of the value of a whole BLT.

As mentioned above, a developer may purchase a partial BLT when the requested additional density is less than the density that would be achieved through purchase of a whole BLT. BLT calculations associated with optional method projects are codified in the Zoning Ordinance.⁸⁵ These calculations are applied to incentive density (density above standard method of development) and often result in the requirement for partial BLT payments from developers. Any partial or whole BLT required by the Planning Board, via an optional method project, is a function of the requirements of a particular zone and the amount of incentive density requested by the developer.

Since 2012, the County has received payments for partial BLTs for 28 different development projects. For those 28 projects, partial BLTs purchased ranged from a low of 0.09 of a whole BLT to a high of 0.96 of a whole BLT; the median average partial BLT was 0.50 of a whole BLT.

The rate of partial BLT purchases has increased in recent years. From 2016 to present, approval of 23 development projects included a requirement to purchase a partial BLT. The partial BLTs for those 23 projects summed to a total of 10.3 BLTs. By way of comparison, during the same time period, developers bought a total of seven whole BLTs. Thus, since 2016, the purchase of partial BLTs has occurred at one-and-a-half times the rate of the purchase of whole BLTs.

The dollar amount that a developer must contribute to the ALPF for a partial BLT is determined by multiplying the portion of a BLT required by the Planning Board by the base value of a whole BLT as established by Executive Order. For all partial BLTs required since 2013, the base value of a whole BLT has been \$222,390 as determined by Executive Order 137-13 issued in July 2013. OLO notes that the base value of a whole BLT has not been adjusted for inflation. As mentioned above, the inflation-adjusted base value of a BLT would be \$257,407 in 2022 dollars.

ALPF Resources and the “BLT Account.” The ALPF receives resources from multiple funding sources. The ALPF receives 75% of Agricultural Transfer Tax receipts for properties in the

⁸⁵ Montgomery County Zoning Ordinance, Section 59.4.7.3.F.

County.⁸⁶ As remaining agricultural land in the County that could be subject to this tax is limited, this funding source is not expected to generate significant revenues in future years. The ALPF also accepts occasional contributions related to specific development actions such as the payment associated with the Crown Farm annexation agreement. Most relevant to this report, the fund receives developer payments for partial BLTs, as described above.

The County Code states that the County must maintain a separate BLT Account within the ALPF to “contain payments made to comply with conditions of approval which the Planning Board has imposed for certain plans...”⁸⁷ In practice, developer payments for partial BLTs are the primary current source of funds for the BLT Account within the ALPF. The Code further stipulates that “funds in the BLT Account must be spent only on BLT easements.”⁸⁸

As of the beginning of Fiscal Year 2023, the BLT Account had a balance of \$1.9 million. Notwithstanding the provision of the Code that restricts use of BLT Account fund for the purchase of BLT easements, the County has expended a cumulative multi-year total of \$0.99 million from the account to pay salary costs related to the management of agricultural preservation easement programs. Absent these salary expenditures, the BLT Account would have had a balance of almost \$3 million. To date, the County has not yet expended any funds in the BLT Account for the purchase of BLTs.

In total, the 28 partial BLTs purchased since 2012 have generated about \$3 million for the ALPF, or an average of about \$280,000 per year. The approved capital improvements program (CIP) project for the ALPF allocates a portion on annual expenditures for administrative (primarily personnel) costs⁸⁹ for agricultural and related programs (such as weed control, deer control and extension services). The County elected to fund these administrative costs with ALPF resources rather than with General Fund resources. OLO notes that these administrative expenditures have in recent years averaged about \$286,000 annually. Thus, revenue generated by partial BLT contributions has been offset by administrative costs charged to the ALPF. As stated above, no ALPF funds have been used to purchase BLTs in past seven years. As such, while developer contributions for partial BLTs support agricultural and related programs, farmers with unsold whole BLTs have not directly benefitted from the purchase of partial BLTs.

As stated in the County’s CIP, the purpose of the ALPF is to “provide funds for the purchase of agricultural and conservation easements.”⁹⁰ During Council review of the Fiscal Years 2023-2028 CIP, Council staff raised concern about the use of ALPF resources to fund personnel costs and operating expenses unrelated to the purchase of agricultural easements. As a result of this discussion, the current approved CIP assumes an approximately \$250,000 reduction in administrative costs charged to the ALPF beginning in Fiscal Year 2024. Adhering to the CIP

⁸⁶ The Agricultural Transfer tax is levied on agricultural properties that are sold or removed from agricultural use.

⁸⁷ Montgomery County Code, Section 2B-17(a) and (b).

⁸⁸ *Ibid.*, Section 2B-17(c)

⁸⁹ These administrative costs are referred to as “Planning, Design, and Supervision” expenditures in the CIP.

⁹⁰ Approved Fiscal Years 2023-2028 Capital Improvements Program, Project #P788911, https://www.montgomerycountymd.gov/OMB/Resources/Files/omb/pdfs/fy23/cip_pdf/P788911.pdf.

expenditure schedule may increase the ALPF fund balance resulting in the additional availability of funds for purchase of agricultural easements, potentially including whole BLTs.

Chapter 5. OLO Findings, Observations, Recommendations and Discussion Questions

For more than four decades, Montgomery County policy has promoted agricultural preservation programs as a means to retain open space and a farming economy as well as to support more sustainable land use development in the urban and suburban portions of the County. This Office of Legislative Oversight (OLO) report examines the history and current status of two County agricultural preservation efforts, the Transferable Development Rights (TDR) and the Building Lot Termination (BLT) programs. This chapter summarizes the key findings and observations from OLO's analysis of the TDR and BLT programs. This chapter also presents OLO's recommendations to the County Council regarding the TDR and BLT programs.

A. Key Findings and Observations

OLO presents the following three **general** key findings and observations relating to County agricultural preservation policies and programs:

1. Through land use decisions, the County has established a policy that agricultural preservation is in the public interest. County agricultural preservation initiatives are intended to retain a farming culture and economy within the Agricultural Reserve while promoting more sustainable development outside the Reserve.
2. Agricultural preservation benefits all County residents in different ways. In addition, the TDR and BLT programs increase the overall supply of housing and may indirectly reduce housing costs for all County residents.
3. At the same time, the history of structural racism has contributed to large racial disparities in land ownership. In Montgomery County, White producers operated 92% of farms and 98% of farmed acreage in the County in 2017. The population of residents eligible to receive compensation through the TDR and BLT programs is therefore overwhelmingly White.

OLO presents the following eight key findings and observations relating to the County's **TDR program**:

4. In the 1980s, the County rezoned land to shift development potential from the Agricultural Reserve to other areas. The TDR program allows landowners in the Agricultural Reserve to sell development rights to developers who can use TDRs for additional residential units in portions of the County zoned for use of TDRs.
5. The objective of the TDR program is to compensate farmers for the loss of equity in their land resulting from downzoning when the County created the Agricultural Reserve.

6. Demand for TDRs is a function of Master Plan recommendations to place TDR Overlay Zones (receiving areas) on specific properties. No master plan approved since 2012 has created a new TDR Overlay Zone on any property.
7. In the early years of the TDR program, the County maintained a “Development Rights Fund” as a safety net for farmers trying to sell TDRs and to assure that demand for TDRs existed until the master plan and zoning processes designated sufficient receiving areas to accommodate the supply of TDRs.
8. Through acquisition of agricultural preservation easements, the County, at times, has taken title to TDRs. At present, the County policy is to not market these TDRs so as to avoid entering into competition against private landowners who seek to sell their TDRs. Nonetheless, the County’s CIP acknowledges the County may alter the policy to allow future sale of County owned TDRs.
9. In 2007, the County Council directed the Planning Department to develop and maintain a record of TDRs that would show statistics about TDR supply and use of TDRs. However, OLO’s analysis suggests that the evolution in technology used to track TDRs and BLTs requires review and improvement to ensure accuracy.
10. Key quantitative components of the TDR program can be estimated but cannot be measured precisely. For example, the methodology used to calculate the potential supply of TDRs is dependent on assumptions regarding whether property owners who have yet to create TDRs elect to do so in the future.
11. OLO estimates there are currently 1,349 created but unused TDRs (excluding those held by the County Government). Planning Department data indicate the current maximum receiving capacity of TDR overlay zones is 966 TDRs. Thus, the supply of created but yet unused TDRs exceed receiving capacity by approximately 400 TDRs. OLO estimates the number of potentially usable TDRs (that is, TDRs created but yet to be used plus TDRs that could be created in the future) at 4,565. By this measure, the estimated remaining TDR supply is about four-and-a-half times greater than current maximum TDR receiving capacity.

OLO presents the following eight key findings and observations relating to the County’s **BLT program**:

12. The BLT program allows for the voluntary placement of permanent land easements that prohibit construction of residential units and restrict the land to certain agricultural uses. The County created the Building Lot Termination easement program, in part, to respond to concerns that the growing market for large homes on large lots led to increased land values that jeopardized the viability of farming in the Agricultural Reserve.

13. The County created the BLT program to preserve farming and prevent fragmentation of the Agricultural Reserve by offering compensation to property owners in exchange for foregoing development of buildable TDRs.
14. Demand for BLTs is a function of development activity in certain zones, primarily the CR and LSC zones.
15. For the past four years, the BLT program has had extremely limited activity, with no BLTs being created and six BLTs sold and used in total since 2018. In contrast, between 2011 and 2018, between four and eleven BLTs were created per year.
16. The County Code authorizes the County to purchase BLTs at a price determined through Executive Order. However, the County has not identified an on-going funding source for the public purchase of BLTs and, as such, has not purchased any BLTs since Fiscal Year 2016.
17. A developer may purchase a partial BLT when the requested additional density is less than the density that would be achieved through purchase of a whole BLT. From 2016 to present, 23 development projects included a requirement of purchase of a partial BLT. The partial BLTs for those 23 projects summed to a total of 10.3 BLTs. By way of comparison, during the same time period, developers bought a total of seven whole BLTs. Thus, since 2016, the purchase of partial BLTs has occurred at one-and-a-half times the rate of the purchase of whole BLTs.
18. The dollar amount that a developer must contribute to the ALPF for a partial BLT is determined by multiplying the portion of a BLT required by the Planning Board by the base value of a whole BLT as established by Executive Order. The most recent Executive Order establishing the price of a BLT was issued in July 2013.
19. The approved CIP project for the ALPF allocates a portion of annual expenditures for administrative (primarily personnel) costs for agricultural and related programs (such as weed control and extension services). Over recent years, the dollar amounts of these administrative expenditures approximately equal the amount generated by developer contributions for partial BLTs. As such, while developer contributions for partial BLTs support agricultural and related programs, farmers with unsold whole BLTs have not directly benefitted from the purchase of partial BLTs.

B. OLO Recommendations

Based on its review of the TDR and BLT programs, OLO presents the following five recommendations to strengthen the TDR and BLT programs.

Recommendation #1: *The Council should: (a) consider the future time span of the TDR program; (b) set a sunset date for creating new TDRs; and (c) direct the Planning Board to establish TDR receiving capacity necessary to accommodate the supply of created TDRs.*

While County policy unequivocally endorses agricultural preservation as an on-going objective, the strategies and methods employed to achieve this objective have evolved over time. More than four decades ago, the County established the TDR program to compensate landowners for the loss of equity resulting from the 1981 downzoning of farmland in what is now the Agricultural Reserve. In the past decade, the amount of TDR activity – including the creation of new TDRs, the establishment of new TDR receiving areas, and the purchase of TDRs to achieve bonus density – has diminished significantly from previous levels.

The current status of the TDR program presents an opportunity to assess the future direction of the TDR program. The current status of the TDR program may be viewed from two divergent perspectives. On the one hand, the County committed to compensate farmers within the Agricultural Reserve for the loss of equity from their property. Many landowners in the Agricultural Reserve have yet to transfer all of their TDRs and thereby receive the compensation that the TDR program was designed to provide. As such, one may argue that the County retains an obligation to foster market conditions conducive to the future sale of TDRs.

On the other hand, during the four decades since the inception of the TDR program, many landowners have elected not to create some or all of the potential TDRs associated with their properties. These potential TDRs may never come into existence. If many potential TDRs fail to materialize, the County will run the risk of creating TDR receiving capacity that is incapable of producing bonus residential density for lack of a sufficient supply of TDRs.

As detailed in Chapter 3 of this report, OLO estimates the current maximum receiving capacity of TDRs in receiving overlay zones is 966 TDRs. Of note, the County has not supplemented TDR receiving capacity in recent years; no master plan approved since 2012 has created a new TDR Overlay Zone on any property.

A landowner's ability to trade development rights for monetary compensation is dependent on a market equilibrium wherein demand for TDRs (that is, receiving capacity) roughly equates to the TDR supply. Policy makers may ask whether current TDR receiving capacity is sufficient to produce the necessary market demand for landowners to sell their TDRs at a fair price. OLO suggests there are two ways to answer this question because there are two ways to measure TDR supply.

One measure is the number of TDRs created but yet to be used. OLO estimates there are currently 1,349 created but unused TDRs (excluding those held by the County Government). By this measurement, the supply of TDRs exceeds the current maximum receiving area capacity (966 TDRs). The County would need to create receiving capacity for about 400 additional TDRs to assure a market for each currently created TDR.

The other measure of TDR supply is the number of potentially usable TDRs (that is, TDRs created but yet to be used plus TDRs that could be created in the future). OLO estimates the total potential supply of TDRs at 4,565. As such, an imbalance exists between the potential TDR supply compared to the current estimated receiving area capacity of 966 TDRs. By this measure, the estimated remaining TDR supply (including both unused TDRs and TDRs that could be created in the future) is about four-and-a-half times greater than current TDR receiving capacity. As the County continues to promote the BLT program, the number of TDRs created likely will increase because landowners must create any remaining TDRs associated with the property to be eligible for a BLT.

OLO suggests that the County needs to establish a means both to honor the County's commitment to Agricultural Reserve landowners as well as to align the demand for TDRs (in the form of TDR receiving capacity) with the actual (as opposed to potential) supply of TDRs. As such, OLO recommends the Council consider the future time span of the TDR program and devise a plan to achieve TDR receiving capacity that is in balance with the supply of created TDRs. This plan should include the following two steps:

1. The County should establish a sunset date for landowners in the Agricultural Reserve to create TDRs from their property (excluding TDRs created concurrent with creation of a BLT on the same property). The purpose for setting a sunset date for creating TDRs is to determine the actual supply of TDRs that will require receiving capacity. The Council should consult with the Planning Board, the Office of Agriculture, landowners, and other stakeholders to determine the appropriate amount of time (perhaps, five to ten years) for the creation of new TDRs. The sunset date should apply neither to excess TDRs that must be created concurrent with the creation of a BLT on the same property nor to buildable TDRs to which the County takes title concurrent with the acquisition of other agricultural easements.
2. The Council should direct the Planning Board to evaluate current County zoning as well as the Zoning Ordinance to identify opportunities to increase demand for TDRs. An increase in TDR demand may be achieved by various means including designating additional developable or re-developable properties under the TDR Overlay Zone or by amending the Zoning Ordinance to incentivize the purchase of TDRs in optional method developments. This effort should begin in the near-term and should continue throughout the time period to create new TDRs. At a minimum, the Planning Board should produce a plan to increase TDR receiving capacity by about 400 units to accommodate the current supply of TDRs that have been created but have not yet been

used. As the period to create new TDRs progresses toward its sunset date, the Planning Board should monitor the creation and use of TDRs as well as the remaining maximum receiving capacity and recommend ways to further increase TDR receiving capacity as necessary to accommodate existing and newly created TDRs.

Recommendation #2: *The Council should direct the Planning Department to develop a strategy to increase demand for BLTs.*

OLO's analysis of data on the BLT program found that no BLTs have been created during the last four years (2019-2022) of the program, and the majority of BLTs created in the prior three years (2016-2018) have not yet been used. During the first five years of the program (2011-2015), the County purchased 30 "Public BLTs," which account for nearly half of the 61 BLTs that have been created. However, those BLTs were purchased using a one-time source of funding and no alternative funding sources have been identified. As a result, the County does not currently purchase BLT easements and has not purchased any BLT easements since Fiscal Year 2016.

Office of Agriculture staff roughly estimate that properties in the Agricultural Reserve zone could theoretically produce about 1,000 BLTs. However, any given property owner may choose not to create a BLT in order to retain the ability to build or maintain a dwelling unit on their property. While it is impossible to predict exactly how many BLTs landowners may create, the data described above strongly suggest that current demand for BLTs is insufficient to accommodate the existing supply. The Planning Board could then review the public benefit provisions of the Zoning Ordinance to identify possible strategies to increase demand for BLTs in consideration of competing public benefit priorities. In addition, the County should periodically re-evaluate the menu of public benefits to verify that the system properly emphasizes outcomes that align with current County priorities (see Discussion Question #3).

Recommendation #3: *At times, the TDR and BLT programs and affordable housing programs represent competing priorities within County land use policy. The Council and Planning Board should identify approaches for balancing these two priorities, with racial equity and social justice as a key consideration.*

In January 2022, the Council approved Zoning Text Amendment (ZTA) 21-07 - Density and Height Allocation – Development with Moderately Priced Dwelling Units. This ZTA exempts developments in the CR and CRT zones from base zone FAR limits (up to a maximum residential density of 2.5 FAR) if all of the residential units are MPDUs or other income-restricted units. Prior to the ZTA's approval, the OAG submitted a letter to the County Council expressing concerns that this ZTA "will ultimately result in limiting the use of TDRs and BLTs..." by allowing developers building affordable housing to achieve the maximum density without using TDRs. In response to this concern, the proposed ZTA was amended to not apply this exemption to CR and CRT properties in a TDR overlay zone.

As noted above, agricultural preservation aims to retain open space and a farming economy as well as to support more sustainable land use development in the urban and suburban portions of the County. All County residents benefit from these efforts in different ways. Furthermore, the TDR and BLT programs increase the overall supply of housing and may indirectly reduce housing costs for all County residents. The TDR and BLT programs also provide compensation to property owners for lost equity resulting from downzoning (in the case of the TDR program) or from relinquishing the right to build dwelling units under current zoning rules (in the case of the BLT program). The more land property owners possess that is eligible for these programs, the more compensation they are eligible to receive.

USDA data from 2017 show that 92% of farms in Montgomery County (515 out of 558) had White principal producers (White residents account for 43% of the County's population). In addition, farms with White principal producers had an average of 125 acres, about five times the average acreage of farms with Black principal producers. The history of structural racism, including chattel slavery, the Homestead Acts, and the absence of reparations for slavery and for Native Americans, combined with inequities in education and the labor market, contribute to existing racial disparities in wealth and ownership of land and other assets.

White residents are therefore more likely to qualify for compensation and for larger amounts of compensation under the TDR and BLT programs than residents of color. In contrast, programs that provide density incentives specifically for affordable housing directly benefit Black and Latinx households, who have a disproportionate need for affordable housing.⁹¹ The Council and Planning Board should identify approaches for balancing agricultural preservation and affordable housing when these priorities compete with one another, with racial equity and social justice as a key consideration.

Recommendation #4: *The Council should direct the Planning Department and the Office of Agriculture to review and improve existing systems and processes for tracking supply of TDRs and BLTs and establish a process for tracking receiving capacity for TDRs.*

In order to develop the estimates of TDR and BLT supply for this report, OLO compared data provided by the Planning Department to lists maintained by the Office of Agriculture of TDRs and BLTs transferred to the County and to publicly available land records. OLO found multiple discrepancies and inaccuracies in the data provided by different County agencies. In addition, in order to estimate current demand or receiving capacity for TDRs, OLO adjusted an estimate developed by Planning Department staff in 2016 by the number of TDRs used since that

⁹¹ Tesfaye, E., and Bonner-Tompkins, E., "Racial Equity and Social Justice (RESJ) Zoning Text Amendment Statement: ZTA 21-07, Density and Height Allocation – Development with Moderately Priced Dwelling Units," Montgomery County Office of Legislative Oversight, October 27, 2021, <https://www.montgomerycountymd.gov/OLO/Resources/Files/resjis/ZTA/2021/ZTA21-07.pdf>

estimate was developed. Estimating receiving capacity is a complex process that involves a property-by-property analysis and requires extensive time and Planning staff expertise.

In Fiscal Year 2007, the County Council directed the Planning Department to develop and maintain a record of TDRs that would show statistics about TDR supply and use of TDRs. OLO finds the existing system for tracking both TDR and BLT supply requires review and improvement to ensure accuracy. In addition, OLO notes that the Planning Department does not currently track changes to TDR demand.

To assist policy makers in reviewing the status of the TDR and BLT programs in the future and to strengthen management of the two programs, OLO recommends the Planning Department and the Office of Agriculture review and improve existing processes for tracking and verifying the estimated supply of TDRs and BLTs including the numbers of:

- Potential TDRs that have not yet been created;
- Existing TDRs that have been recorded on a subdivision plat, transferred to Montgomery County, or are privately held and have not yet been recorded on a subdivision plat; and
- Existing BLTs that have been used, transferred to Montgomery County, or are privately held and have not yet been used.

OLO further recommends the Planning Department develop a process for tracking the estimated receiving capacity for TDRs on a periodic basis.

Recommendation #5: *The Council should request the Executive update the Executive Order that determines the base value of BLTs to assure the dollar amount of developer contributions for partial BLTs are set at an appropriate level.*

County regulations allow for public purchase of BLTs at a “base value” dollar amount set by Executive Order. As the County has not purchased any BLTs in recent years, the Executive has not updated the base price of a BLT since an Executive Order dating back to July 2013. However, the base value of a BLT is also relevant in the context of “partial BLTs.” When a developer seeks approval of an optional method development with additional density less than would be achieved through purchase of a whole BLT, the developer may meet public benefit requirements by contributing to the Agricultural Land Preservation Fund (ALPF) for a “partial BLT.” The dollar amount that a developer contributes to the ALPF for a partial BLT is determined by multiplying the portion of a BLT required by the Planning Board by the base value of a whole BLT as established by Executive Order. Greater than two dozen partial BLT contributions have been made since the BLT base value was last set almost a decade ago. The contribution amount for these partial BLTs were determined by a base value that has neither been recently re-assessed nor adjusted for inflation. As a result, the County may have “left on the table” dollars that could have supported agricultural preservation. To rectify this possible

underpricing of partial BLTs, OLO recommends the Council ask the Executive to issue an updated Executive Order to establish the base value of a BLT.

C. Discussion Questions

The County created the Agricultural Reserve more than four decades ago to conserve farmland, maintain a local food supply, and preserve the agricultural industry and rural communities. As stated on the County's website, the Agricultural Reserve has been "heralded as one of the best examples of land conservation policies in the country." This review of the TDR and BLT programs offers an opportunity for policy makers and the community to chart a future course for the County's agricultural preservation efforts. More specifically, OLO suggests that the Council, County Executive, Planning Board, and County residents consider the following questions regarding the long-term direction of the TDR and BLT programs and the relationship between these programs and other County policies and priorities.

Discussion Question #1: *In future years, should the County intervene in the TDR and BLT markets (for example, by buying TDRs and BLTs with public dollars or by selling County owned TDRs)? If so, under what conditions or circumstances should the County intervene?*

In recent years, the County has not been an active player in the TDR and BLT markets. For almost a decade, the ALPF has had insufficient resources to purchase TDRs or BLTs. In the early years of the TDR program, the County intervened to assure an active market for these assets. The County maintained a "Development Rights Fund" to assure that demand for TDRs existed until the master plan and zoning processes designated sufficient receiving areas to accommodate the supply of TDRs. Policy makers should consider under what circumstances, if any, the County should use public resources to purchase TDRs or BLTs.

While the County has title to 1,148 TDRs, the County has not offered these assets for sale in order not to over-saturate the supply side of the TDR market and depress prices. This policy remains prudent today given the current lack of demand for TDRs. However, should the County successfully boost TDR demand through the zoning process, then policy makers could establish criteria for when, if ever, the County would sell TDRs.

Discussion Question #2: *What are the preferred uses for Agricultural Land Preservation Fund resources? Should the County support agricultural preservation administrative costs with General Fund resources to conserve ALPF funds for purchase of agricultural easements?*

As stated in the County’s CIP, the purpose of the ALPF is to “provide funds for the purchase of agricultural and conservation easements.” However, in recent years, about \$286,000 annually from the fund have been designated to pay administrative expenditures such as salaries and operating expenses. These expenditures have offset the approximate \$280,000 per year generated by developer contributions for partial BLTs. Of note, no ALPF funds have been used to purchase BLTs in the past seven years.

While developer contributions for partial BLTs support administration of agricultural and related programs, these contributions have not benefitted farmers with unsold whole BLTs. The current approved CIP assumes an approximately \$250,000 reduction in administrative costs charged to the ALPF beginning in Fiscal Year 2024. Presumably, General Fund resources will replace the ALPF dollars used for these expenditures. In each subsequent CIP, the Executive and Council will have to consider how to fund agricultural preservation administrative costs and how to maximize the use of ALPF resources for the acquisition of easements, including BLT easements.

Discussion Question #3: *Under current County land use and zoning policies, multiple types of public benefits compete for developer-provided public facilities, amenities or contributions. Moving forward, what should be the relative priority of agricultural preservation (as achieved through the BLT program) versus other public benefits in County land use and zoning policies?*

County land use and zoning policies allow developers to earn increased density for optional method development in certain zones by providing public facilities, amenities or otherwise contributing resources to advance specified outcomes. For example, developers may receive approval for additional density through purchase of whole or partial BLTs. In the Commercial Residential (CR) and Life Sciences Center (LSC) zone, the Zoning Ordinance requires the purchase of a whole or partial BLT for an initial optional method density bonus (see details in Chapter 4). A developer may earn further CR or LSC zone density allowances through additional purchases of whole or partial BLTs. In the Commercial Residential Town (CRT) and the Employment Office (EOF) zones, a developer may voluntarily purchase whole or partial BLTs to increase density under the optional method.

Developers may also acquire optional method density points by providing public benefits other than BLTs. As shown in the table below, the County Zoning Ordinance includes seven categories of public benefits.

Public Benefit Category	Examples
Major Public Facilities	Provision of a school, library, recreation center, park, bikeshare station, public transportation, utility upgrade.
Transit Proximity	Development located near an existing or master planned rail or bus station.
Connectivity and Mobility	Dedication of rights-of-way, reduction in parking spaces, improvement of access to transit, streetscaping.
Diversity of Uses and Activities	Provision of adaptive spaces, enhanced accessibility, affordable housing.
Quality Building and Site Design	Architecturally compatible development, preservation of historic resources, provision of public open space, structured parking.
Protection, Enhancement of Natural Environment	Purchase of BLTs , energy efficient development, habitat preservation, tree canopy protection, vegetated roof.
Building Reuse	Retention of existing buildings.

The Zoning Ordinance assigns a number of points for each type of public benefit. Developers may achieve additional density by meeting the specified criteria for each specific sub-category of public benefits. The ability of developers to select from a “menu” of public benefits creates an element of competition among the different benefit types. Similarly, the assignment of differing amounts of density points to each benefit establishes a degree of relative prioritization among competing benefits. As policy priorities may change over time, the Council and Planning Board should consider re-evaluating the menu of public benefits and the associated assignment of points every few years to verify that the system properly emphasizes outcomes that align with current County priorities.

In April 2022, the Planning Board reported to the Council that Planning Department staff will undertake an evaluation of the optional method public benefit incentive density guidelines for the CR and employment zones in Fiscal Year 2023. Work commenced in August 2022. The Planning Department expects to report its findings and recommendations to the Planning Board by the end of Calendar Year 2023. Subsequently, further work may be needed to prepare an accompanying ZTA to address any recommended changes. The Planning Department expects to present findings and any associated ZTA to the County Council by the fall of 2024.

Chapter 6. Agency Comments

The Office of Legislative Oversight (OLO) shared final drafts of this report with staff from Montgomery County Government and the Maryland-National Capital Park and Planning Commission (M-NCPPC). OLO appreciates the time taken by staff to review the draft report and to provide technical feedback. This final report incorporates technical corrections and feedback from agency staffs.

The written comments received from agency staffs are attached in their entirety beginning on the following page.



OFFICE OF THE COUNTY EXECUTIVE

Marc Elrich
County Executive

Richard S. Madaleno
Chief Administrative Officer

MEMORANDUM

January 11, 2023

TO: Chris Cihlar, Director
Office of Legislative Oversight

FROM: Richard S. Madaleno, Chief Administrative Officer *BSM*

SUBJECT: Draft OLO Report 2023-1: Transferable Development Rights and Building Lot Termination Programs in Montgomery County

Thank you for the opportunity to comment on the Office of Legislative Oversight's (OLO) Draft Report 2023-1: Transferable Development Rights and Building Lot Termination Programs in Montgomery County.

The creation of the Agricultural Reserve, totaling almost one third of the County, is one of the best examples nationwide of land conservation, smart growth policy, and agricultural preservation. Montgomery County still has 558 farms that contribute over \$282 million annually to the County's economy. Montgomery County residents are fortunate to have agriculture continue as an industry, as an environmental resource, and as our historical heritage.

The County has a mandate for racial equity and social justice that includes farming. Access to land for non-white farmers continues to be a challenge due to the increasing cost of land in the County. Moving forward, the County will need to develop policies and incentives that will help to address access to land for all people of color who have ambitions to produce food locally. The County will work to improve access to land and increase investment to historically underserved populations.

The draft report includes the following recommendations.

Recommendation #1: The Council should: (a) consider the future time span of the Transferable Development Rights (TDR) program; (b) set a sunset date for creating new TDRs; and (c) direct the Planning Board to establish TDR receiving capacity necessary to accommodate the supply of created TDRs.

CAO Response: We support the Council establishing a future time span for the Transferable Development Rights program that began after the 1980 down zone that was the catalyst for the Agricultural Reserve and the TDR program. We support a sunset date for creating new TDRs, although we are concerned about the order of the actions listed above. We believe the sunset provision should be designed in a manner that does not interfere with existing preservation programs. We support the Council directing the Planning Board to establish TDR receiving capacity necessary to accommodate the supply of all TDRs.

We believe the TDR program needs to be a truly economically viable option before requiring farmers to encumber their farms with TDR easements. The County should consider more incentives for farmers creating their TDRs because TDR easements restrict their property rights. The County should take action to address the fact that there has been no market demand to use TDRs since 2012. TDR easements restrict future uses of the farms in addition to creating TDRs as a real property asset that farmers use to help purchase farmland and make capital improvements on their farms. The County and M-NCPPC should reacknowledge the promise and commitment that was made to the property owners in 1980 when their properties were down zoned to create the Agricultural Reserve, which negatively impacted the equity in their farms. Farmers may rightfully question the rationale for encumbering their farms with TDR easements when there is very limited market demand to use them. The OLO report shows that the County needs to create new TDR receiving capacity in the overlay zones that would accommodate 4,565 TDRs. Currently there is capacity to absorb only 966 TDRs, and this ongoing imbalance negatively impacts the farmers ability to sell their TDRs at realistic prices. The TDR program worked as intended until the Great Recession of 2007-2008. However, since then the TDR program has not worked the way it was originally designed. The County needs to revitalize the program and find new ways to use TDRs, including increasing the equivalency of one TDR or finding new uses in affordable housing. It is only after the new TDR receiving capacity is created that we believe a sunset date could be established, ensuring the farmers adequate time to create these TDRs. We believe that may take approximately five to ten years.

Recommendation #2: The Council should direct the Planning Department to develop a strategy to increase demand for Building Lot Terminations (BLTs).

CAO Response: We support Council directing the Planning Department to develop a strategy to increase demand for Building Lot Terminations (BLTs), and this should include revisiting the BLT incentive densities/equivalencies. The BLT and TDR programs are great examples of smart growth policies that have helped to reduce residential sprawl in agricultural areas by concentrating development where public infrastructure (water, sewer, roads, schools, etc.) and other resources are located. The BLT program provides opportunities for farmers generating equity from foregone residential development that contributes to the fragmentation of farmland. The County and M-NCPPC should explore ways to utilize TDRs and BLTs when developing affordable and workforce housing.

Recommendation #3: At times, the TDR and BLT programs and affordable housing programs represent competing priorities within County land use policy. The Council and the Planning Board should identify approaches for balancing these two priorities, with racial equity and social justice as a key consideration.

CAO Response: We agree with the recommendation of finding approaches that balance the priorities of TDRs/BLTs and affordable housing. The Council and the Planning Board can review the densities/equivalencies of TDRs and BLTs and find new uses for them in affordable housing projects through a racial equity and social justice lens and through the goals of the climate action plan.

Recommendation #4: The Council should direct the Planning Department and the Office of Agriculture to review and improve existing systems and processes for tracking supply of TDRs and BLTs and establish a process for tracking receiving capacity for TDRs.

CAO Response: We agree with this recommendation. The Office of Agriculture will work with the Office of the County Attorney (OCA) and Planning Department staff to improve tracking systems and processes. OCA is responsible for approving TDR easements and assigning the serialized numbers for TDRs created by TDR easements. The Office of Agriculture is responsible for tracking all TDRs associated with the other agricultural preservation easement programs. M-NCPPC is responsible for tracking the TDR serialized number from the TDR easement and assigning this TDR number on final approved record plats of subdivision for each TDR that permits an additional unit above the base zone density. We believe the final counting of remaining TDRs in the Agricultural Reserve would be improved by the M-NCPPC utilizing the TDR Extinguishment Document.

Recommendation #5: The Council should request that the Executive update the Executive Order that determines the base value of BLTs to assure that the dollar amount of developer contributions for partial BLTs are set at an appropriate level.

CAO Response: We do not agree with this recommendation at this time based upon several factors. The price of a buildable lot with a retained development right for sale in the Agricultural Reserve has remained stable (estimated maximum BLT price \$254,000 per buildable lot and base BLT price of \$222,390 per BLT) since 2012. The County Executive believes the County has not missed opportunities for greater collections of developer contributions. Furthermore, until which time there is a reliable and sustainable funding source to publicly purchase whole BLTs, we do not believe ordering a new appraisal to establish the maximum and base BLT prices is warranted.

Discussion Question #1: In future years should the County intervene in the TDR and BLT market (for example by buying TDRs and BLTs with public dollars or by selling County owned TDRs)? If so, under what conditions or circumstances should the County intervene?

CAO Response: We believe the County intervening and purchasing TDRs or BLTs should only occur once the creation of additional receiving capacity or incentives for new uses of TDRs or BLTs materializes. We do not believe the County should sell its own TDRs unless there is sufficient TDR demand in TDR receiving areas above the 4,565 TDRs that are identified in this report.

Discussion Question #2: What are the preferred uses for Agricultural Land Preservation Fund resources? Should the County support agricultural preservation administrative costs with General Fund resources to conserve ALPF funds for purchase of agricultural easements?

CAO Response: We agree that it is desirable to maximize the funds available for the purchase of easements. The administrative costs are directly related to the program and are an appropriate CIP eligible expense. Inclusion of administrative costs in the CIP assures more continuity of the program through budgetary ups and downs. Economic downturns have in the past created difficult budget situations for the Office of Agriculture. In turn, this has impacted their ability to provide all their programs and services to the agricultural community.

In FY24, non-agricultural preservation related expenses will be migrated to the General Fund budget. This will allow for more funds to be used to purchase easements even though it places the administrative responsibilities of the program at risk of operating budget volatility.

Discussion Question #3: Under current County land use and zoning policies, multiple types of public benefits compete for developer-provided public facilities, amenities or contributions. Moving forward, what should be the relative priority of agricultural preservation (as achieved through the BLT program) versus other public benefits in County land use and zoning policies?

CAO Response: The County Executive would reduce the number of public benefits, removing from the list any benefit that a developer is likely to do anyway, while retaining substantive benefits like the developer's use of the BLT program for agricultural preservation. He further recognizes that there are many competing interests in the County and balancing these interests is difficult. We believe agricultural preservation is one of the County's priorities, as demonstrated by the creation of the Agricultural Reserve forty-three years ago that set aside one-third of the County for farming and started the smart growth policy with the TDR program.

As we said in response to recommendation #3, we believe finding new densities, equivalencies,

or uses for BLTs could be a way to incentivize developers into using more BLTs. The County should explore how TDRs and BLTs can be used to achieve new public policies for racial equity and social justice, as well as new public policies for the climate action plan.

We look forward to discussing these items at the Council work session.

RSM/jc

cc: Fariba Kassiri, Deputy Chief Administrative Officer
Dale Tibbitts, Special Assistant to the County Executive
Ken Hartman, Director of Strategic Partnerships, Office of the County Executive
Jeremy Criss, Director, Office of Agriculture
Mike Scheffel, Manager, Office of Agriculture



January 5, 2023

Chris Cihlar

Director of the Office of Legislative Oversight
Council Office Building
100 Maryland Avenue, 4th Floor
Rockville, MD 20850

Dear Mr. Cihlar,

Thank you for the opportunity to respond to this document. Planning staff largely concurs with the data represented in this report, as it is the result of many weeks of extensive coordination and refinement over several weeks between the Office of Legislative Oversight, the Office of Agriculture, and the Planning Department.

The Planning Department has the following responses to the recommendations, as suggested by the Office of Legislative Oversight.

Recommendation #1: The Council should: (a) consider the future time span of the TDR program; (b) set a sunset date for creating new TDRs; and (c) direct the Planning Board to establish TDR receiving capacity necessary to accommodate the supply of created TDRs.

(a) and (b)

When the TDR Program was established by the Agriculture and Rural Open Space (AROS) Functional Master Plan in 1980, it was not anticipated that all TDRs would be utilized. The data in this report suggests that the TDR Program exceeded expectations on the percentage of TDRs created and transferred compared to theoretical estimates at the time the program began. From that perspective, the Planning Department believes it is appropriate to consider the future time span of the TDR Program and to set a sunset date for creating new TDRs. The Council should consider whether the TDR Program continues to be the best tool for achieving the original purpose of the program, which, as OLO has highlighted, was to “compensate landowners in the AR zone for [the] loss of equity” that occurred when their properties were downzoned through implementation of the AROS Plan. Should the Council decide to ultimately sunset the TDR Program, several of the subsequent recommendations in this report would become moot.

(c)

As each property within a TDR Overlay Zone is developed, the TDR receiving capacity decreases. Thus, TDR receiving area capacity is a moving target. The Planning Department continues to believe that the master plan process is the most appropriate way to designate new TDR receiving areas. As such,

Planning staff will ensure that the Planning Board and County Council consider the appropriateness of increasing TDR receiving area capacity through each master plan effort.

Recommendation #2: The Council should direct the Planning Department to develop a strategy to increase demand for BLTs.

The BLT Program commenced in 2018. Implementation was just getting started when the pandemic unfolded. The Planning Department believes we are still in the beginning stages of this program; however, we are reviewing if there is a way to strengthen the BLT Program as part of the evaluation of the CR Zone public benefits points system, which is currently underway. Planning staff will present any recommendations to the Planning Board and County Council later this year. To date, there have been 61 BLTs created with 55 BLTs already purchased or committed to be purchased by optional method projects in the pipeline. While the Planning Department is not opposed to finding ways to further support the BLT Program, the Planning Department suggests that we continue to evaluate areas that may be appropriate for rezoning to CR family zones through master planning efforts.

Recommendation #3: At times, the TDR and BLT programs and affordable housing programs represent competing priorities within County land use policy. The Council and the Planning Board should identify approaches for balancing these two priorities, with racial equity and social justice as a key consideration.

The Planning Department acknowledges that there are many competing priorities and goals in the County. Through recent master plans, the County Council and Planning Board have placed a greater emphasis on incentivizing affordable housing and parks/open space priorities, rather than the purchase of TDRs. However, these same plans have provided new opportunities for the purchase of BLTs by increasing the amount of CR-zoned land, which requires the purchase of BLTs for optional method development projects. Although similar in nature, the TDR and BLT Programs are implemented quite differently and achieve different goals. Furthermore, the County has more recently placed a greater emphasis on promoting and supporting multiple forms of housing to address the housing shortage and lack of affordable housing in the County. Improving racial equity and social justice in the County is more inherently tied to affordable housing than by promoting the TDR and/or BLT Programs. However, the Planning Department suggests that when considering additional areas for TDR Overlay Zones during master plan updates, we also consider additional density for affordable housing and a mix of housing typologies for projects within those areas.

Recommendation #4: The Council should direct the Planning Department and the Office of Agriculture to review and improve existing systems and processes for tracking supply of TDRs and BLTs and establish a process for tracking receiving capacity for TDRs.

Through extensive coordination and collaboration with the Office of Agriculture and the Office of Legislative Oversight, we have improved communication and collectively identified ways to improve information sharing and tracking between the Planning Department and Office of Agriculture. Additionally, through this exercise, by sharing, comparing, and reorganizing information, we have already improved how the supply of TDRs and BLTs will be tracked and documented moving forward.

Additionally, if sunseting the program is desired, that will likely require an extensive parcel-by-parcel inventory of remaining TDRs to be established jointly by the Office of Agriculture and the Planning Department.

While tracking receiving capacity for TDRs is more complicated and can be done multiple ways, this is something that the Planning Department can address through master plan updates and continued coordination with the Office of Agriculture.

Recommendation #5: The Council should request that the Executive update the Executive Order that determines the base value of BLTs to assure that the dollar amount of developer contributions for partial BLTs are set at an appropriate level.

The Planning Department agrees with and supports this recommendation. The base value of BLTs should be updated periodically to ensure fair compensation for BLTs.

Discussion Questions

The Planning Department believes the questions posed by OLO are good ones to contemplate, and we look forward to participating in conversations around these topics.

Conclusion

The Planning Department appreciates the opportunity to have participated in this evaluation, and we value the continued collaboration and teamwork with the Office of Agriculture. We look forward to further discussions on the TDR and BLT Programs with the Planning Board and County Council, and we will continue to support the TDR and BLT Programs as the County Council determines is appropriate.

Sincerely,
Tanya Stern

Tanya Stern
Acting Planning Director

Appendix

In 2016, Planning Department staff estimated total TDR supply (which includes TDRs that have already been created as well as TDRs that could be created in the future), to be approximately 10,900. Staff arrived at this estimate using GIS (geographic information system) software and data to determine how much land in the AR zone could generate TDRs. This analysis filtered out publicly owned land, bodies of water and properties too small to generate TDRs. As of February 2022, a total of 10,381 TDRs has been serialized, which suggests that approximately 500 out of the estimated total 10,900 TDRs remain to be created in the future.

However, in response to OLO data requests for this report, Planning Department and Office of Agriculture staff identified numerous privately owned property parcels in the AR zone that have not yet created TDRs. These parcels could generate significantly more than the estimated 500 potential TDRs that would be expected based on the previous estimates. As a result, Planning Department staff conducted a new analysis, using a different methodology, that resulted in an estimated total TDR supply of 13,597.

To arrive at the total of 13,597 TDRs, Planning Department staff conducted an analysis of the 5,621 property parcels (individual real properties) that are located in the AR zone. It is important to note that many parcels have changed ownership and/or been subdivided over the 40-year life of the TDR program. Some parcels that are currently publicly owned, were previously privately owned and generated TDRs, and it is challenging to match previously created TDRs with property parcels as they exist today. Therefore, Planning Department staff focused on identifying all privately owned properties that have not yet generated any TDRs and could generate TDRs in the future. As a first step, Planning Department staff eliminated those parcels that are not eligible to create TDRs, which include:

- Parcels consisting of fewer than five acres;
- Parcels owned by Federal, State or County entities (including parks and schools);
- Right-of-way parcels;
- Utility parcels; and
- Places of worship.

Planning Department staff also eliminated parcels associated with previously created TDRs and then confirmed the remaining 801 parcels have not generated any TDRs in the past but could generate TDRs in the future. Planning Department staff then estimated that these 801 parcels have the capacity to generate 2,416 TDRs.⁹²

⁹² To generate this estimate, each parcel's acreage was divided by five, and the resulting number was truncated (meaning that the decimal portion was removed), to quantify the maximum number of TDRs that the parcel could generate. Using the example of a 54-acre parcel, its acreage divided by 5 is 10.8, which would be truncated to 10 as the maximum number of TDRs that could be generated. However, Planning Department staff also subtracted one TDR for each dwelling unit as well as one TDR for any additional "buildable" TDRs. If that 54-acre parcel has

In addition, the Planning Department conducted an analysis of the parcels that generated TDRs in the past, based on the parcels as they existed at the time of the creation of the TDRs. Planning Department staff estimate that parcels that have previously generated TDRs have the capacity to generate an additional 800 TDRs. As shown in the table below, together with the 10,381 TDRs that have already been created, these estimates suggest a total TDR supply of 13,597.

Existing and Potential TDRs	
Category	# TDRs
Existing TDRs created as of February 2022	10,381
Total potential TDRs	3,216
<i>Potential TDRs on parcels that have not yet created TDRs</i>	2,416
<i>Remaining potential TDRs on parcels that have created TDRs</i>	800
Total	13,597

Source: Planning Department Staff

one dwelling unit on it, then it could generate eight TDRs (10 minus 1 dwelling unit and 1 additional buildable TDR).