

## **MEMORANDUM**

February 8, 2023

**TO:** Planning, Housing & Parks Committee

**FROM:** Natalia Carrizosa, Senior Legislative Analyst  
Aron Trombka, Senior Legislative Analyst  
Office of Legislative Oversight (OLO)

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

On February 13, the Planning, Housing & Parks Committee will discuss the findings of OLO Report 2023-1, *Transferable Development Rights and Building Lot Termination Programs in Montgomery County*, which the Council received and released on January 17, 2023. OLO will present a summary of the report at the Committee meeting.

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. The full report is available on [OLO's website](#). This staff report summarizes this report's findings and recommended discussion issues. The Executive Summary of the report is attached at ©1 and the formal comments from the Chief Administrative Officer and Planning Department are attached at ©5.

### **FINDINGS**

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

- 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.

- 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.
- 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:**

- 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- 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.

- 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:**

- 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.
- 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.
- Demand for BLTs is a function of development activity in certain zones, primarily the CR and LSC zones.
- 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.
- 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.
- 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.
- The dollar amount that a developer must contribute to the Agricultural Land Preservation Fund (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.

- 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.

## **OLO RECOMMENDATIONS AND DISCUSSION ISSUES**

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

- 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.
- The Council should direct the Planning Department to develop a strategy to increase demand for BLTs.
- 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.
- 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.
- 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.

OLO suggests 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.

- 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?
- 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?

- 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?

## **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?*



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, 4<sup>th</sup> 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