

DENSITY OF DEVELOPMENT IN MONTGOMERY COUNTY

The distribution of development of various types in Montgomery County is dependent upon planning and zoning including a number of incentives. A key goal has been to preserve large parcels of agricultural and rural open space in the agricultural reserve while allowing denser development in other parts of the county where suitable infrastructure exists. Initially the wedges and corridors concept set forth in the 1964 General Plan was the basis for such distribution of denser development. Current Smart Growth policies that call for creating more walkable communities and denser multi-use, transit-oriented development are consistent with that approach; however, both zoning and the type and number of incentives available have evolved over time.

To maintain rural, agricultural areas, the Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County adopted in 1980 established the boundaries of the agricultural reserve. The zoning code designated a rural density transfer zone to provide the framework for land utilization in the agricultural reserve. This zone under the 2014 zoning rewrite has been designated the Agricultural Reserve (AR) zone. Landowners were compensated for downzoning through the newly created Transfer of Development Rights (TDR) program and later incentivized to preserve agricultural land through the Building Lot Termination (BLT) program. Both of these programs provide compensation to landowners for loss of development rights while leaving ownership and somewhat restricted use of the land to the landowner.

To accomplish the desired growth in the non-agricultural sectors of the county, the various sector plans laid out a configuration of residential, commercial, office and industrial uses later supplemented with mixed use areas. For some time a new zone was created with almost every sector plan to define the type of development desired. TDR receiving areas were identified as residential zones which permitted density above the base density of the residential zone through the acquisition of TDRs. With the advent of the BLT, additional density for non-residential development in a limited number of zones could be obtained through the purchase of BLTs. Both the TDR and the BLT serve as tools for obtaining increased density in areas near infrastructure while meeting other community goals.

THE AGRICULTURAL RESERVE

The Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County adopted in the early 1980s set forth a variety of public purposes to be accomplished by the plan's implementation. The plan pointed out that preserving farm land not only involved preservation of individual farms, productive soils and a way of life, but also met other public purposes such as control of public costs associated with suburban sprawl, preservation of regional food supplies, energy conservation, air and water quality protection and adherence to the county's growth management systems.

The plan was implemented in response to the county zoning that reduced the density of housing allowed in the agricultural zone from one dwelling per 5 acres to one per 25 acres. To compensate landowners for the loss of development capacity and the ensuing equity that would accrue to them, a program was developed to allow landowners to sell development rights to builders who wanted to create subdivisions in areas having the infrastructure available to accommodate denser development. The Transfer of Development Rights program allows land owners in the AR zone to create TDRs for their property at the rate of one right per five acres. Such development rights are granted at the request of the landowner who controls the timing and number of TDRs to be created. Customarily a landowner is advised to retain one potential development right for each 25 acres for future development. At the time the first TDR is created from the property, an easement is placed encumbering the entire property and it is recorded in the land records of the county forever limiting the

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property's development to one dwelling unit per 25 acres. One development right must be retained for each dwelling on the property although tenant houses and child lots provide some exceptions to this provision. TDRs are sold on the private market with landowners selling directly to developers or to brokers.

In the early 1980's the demand for rural lots was relatively low, but as the economy has expanded the demand for such lots has increased substantially. Of the five development rights apportioned for each 25 acres, all rights could be transferred, but typically the landowner retains one of the five to preserve the right to build on his property in accordance with the AR zoning. This retained TDR was referred to for many years as the buildable TDR or the 5th TDR. To preserve large tracts of farmable land, under AR zoning houses are allowed to be clustered and the standard lot size allows a house to be built upon as little as one acre of land. Thus the zoning encourages owners of large farms to balance the subdivision of land in favor of maintaining large agricultural remainders. This allows landowners the capability to exercise their property right to create wealth by utilizing the buildable TDRs to build small subdivisions. In its 2006 study the League arrived at a consensus position favoring the utilization of the 5th TDR to grant increased density in commercial, office and R&D development areas and thus provide alternative means to capitalize on the value of the 5th TDR.

The BLT: At the end of 2006, the Ad Hoc Agricultural Policy Working Group appointed by the County Council expressed concern about ongoing development pressures in the Agricultural Reserve. It recommended that a new type of transferrable development right be created. A Building Lot Termination (BLT) easement was suggested for a tract of at least 25 acres having a bona fide building site (one with an approved septic system including the required two backup sites). The landowner would be allowed to create a BLT through a legal instrument called a BLT/TDR easement encumbering the entire property. The right to utilize that septic site would be terminated along with the 5th TDR and the land owner would be granted a BLT having a unique serial number to enable purchase by a developer. This type of BLT transaction was envisioned as a privately funded agriculture preservation program with the transfer of development rights to work in a manner similar to that of the TDR.

The Publicly Funded BLT Easement: The County Council passed enabling legislation for a BLT program in late 2008 through Bill 39-07 which differed slightly from the Working Group's recommendations. The effective date of the code provision was February 24, 2009. The primary purpose of the BLT easement is to preserve agricultural land by reducing the fragmentation of farmland resulting from residential development. The County Executive issued an executive regulation adopted by the County Council in mid-2010 detailing the process for implementing a publicly funded BLT program with funds generated by the state agricultural land transfer tax or other county funds allocated to the program.

A key feature of the BLT easement is an enhanced level of agricultural land preservation that compensates landowners who can demonstrate that their land is capable of residential development, but agree, as part of the BLT easement, to forego residential development and to restrict other types of development on their land. The price for a BLT is established annually by the County Executive who determines a minimum, or base value, and a maximum value, both based upon a percentage of the value of a building lot in the Reserve. In 2015 a public BLT was priced at a base value of \$225,000 with a maximum of about \$254,000 per BLT. Each BLT easement must be recorded among the land records of Montgomery County and included in the Office of Agriculture's annual report on agricultural easements. The Office must maintain a ledger of all of the serialized TDRs created and conveyed to the county through the BLT program. The Office of Agriculture will monitor the properties under easement biannually to ensure compliance with the easement terms.

To be eligible for inclusion in the public BLT program, the land must be located in the AR zone and must be at least 50 acres in size; however, a smaller property may be considered if it is contiguous to other lands protected from development by state or county agricultural or conservation easement. At least 50 percent of

the land under consideration for an easement must meet certain USDA soil classification standards, lie outside water and sewer service areas and not be encumbered by a federal, state or county agricultural or conservation easement, except land already protected by a TDR easement may still be eligible.

If a landowner is interested in selling a BLT to the county, the landowner must submit an easement sales application to the Office of Agriculture. The application must include a completed property description including a septic system site plan approved by the Department of Permitting Services (DPS) with an on-site septic absorption area contained entirely within the legal description of the property, a minimum absorption area of 10,000 square feet or such additional area required by DPS for each BLT to be purchased, and be separated from any other septic absorption area on the property by at least 50 feet. The county also requires that the applicant have a nutrient management plan and a soil and water conservation plan with implementation to be completed within 10 years.

The Agricultural Preservation Advisory Board (APAB) reviews applications, assigning value of a maximum of 20 points based upon three factors: 1. The size of property, as determined by deed or recent survey, representing up to a maximum of 5 points. 2. Soil quality, determined by the percentage of high quality land, but not including any acreage included within the 100-year floodplain or any acreage included in state or federal wetlands, representing up to a maximum of 10 points. 3. The length of time the land has been in agricultural use for a maximum of 5 points.

Because of increased interest in agricultural land preservation and limited financial resources available for county BLT easement purchase, the APAB ranks all applicants and makes recommendations to the county. Generally it gives higher purchase priority to properties for which steps toward development have already begun with the goal of preventing as much development as possible and maintaining land for agricultural production. The ranking system does not preclude the Office of Agriculture and APAB from deciding to purchase BLTs from multiple property owners rather than only the one or two highest ranked applications.

Residential uses are permitted on properties encumbered by a BLT easement only when reserved residential lots are retained as part of the easement. The landowner whose land is subject to a BLT easement must not use or subdivide the land for residential, commercial, industrial, or any other non-agricultural uses except as contained within the terms of the easement. The BLT easement may allow the landowner to retain certain opportunities for future single family dwellings and, if the request is approved, each reserved residential lot must be equal to two acres, or the minimum lot size required by zoning and well and septic regulations, whichever is greater. A larger size may be considered only if it does not interfere with the agricultural character of the land, as determined by the APAB in its sole discretion. This provision allows the county to give priority to a residential lot right to support a farming operation over just a subdivision lot right. The landowner must apply in writing to the APAB prior to filing a preliminary plan of subdivision.

Funding the Public BLT Program: The agricultural land transfer tax is collected by the state when a parcel of agricultural land is sold and removed from agricultural use. Since 1978 the county's share of this tax has been the primary source of funding to support the purchase of easements to protect agricultural land. While once a sustainable source of funding, since 2007 the yearly collection from this source has averaged under \$300,000 per year. Without a reliable and sustainable funding stream, the Office of Agriculture indicates there are not sufficient resources in the Agricultural Easement Program's capital improvement budget to support the County's agricultural land preservation initiatives including the public BLT easement program. It estimates that \$3 million in public funding coupled with an active private market and state easement programs would be needed annually over the next 20 years to enable the County to achieve the goal of creating 962 BLTs to protect 70,000 acres of the agricultural land through the purchase of development rights easements in the agricultural reserve.

The APAB has developed a list of potential alternative sources of funds for the purchase of agricultural easements in the capital improvement budget for the period 2017-22. Because preserving agricultural land reduces impervious surfaces and thus improves water quality, the Water Quality Protection Charge could be a source of funds. Since a soil and water conservation plan is required for public purchase of a BLT, an earlier implementation deadline could be required to promote this funding. The excise tax on disposable plastic bags which is allocated to the storm water management fund could be a source. While the county Land Transfer Tax is assessed on all agricultural land sold, none of the proceeds goes to support agricultural land preservation. Either a portion of that tax, or the investment income from the tax collected, could be a source. Finally, the county's Legacy Open Space Master Plan recommended supplemental funding for the county agricultural easement program: however, public access to property funded under that program could be an issue. In his report to the County Council's Planning, Housing and Economic Development Committee meeting on the Capital Improvement Budget, Jacob Sesker reported "Legacy Open Space funds would be an option if M-NCPPC were willing to provide funds to purchase easements for the purposes of agricultural preservation only, but M-NCPPC would like such easements to also include public access for recreational opportunities-public access on land protected under agricultural easements is not allowed under Chapter 2B of the County Code."

Private Market for BLTs: A private market for BLTs has been generated in connection with site development approvals within appropriate zoning classifications. As the master plan for the Twinbrook area was being developed early in 2008, even before the public BLT ordinance was adopted, the planning department was discussing the utilization of the 5th TDR. The Transit Mixed Use (TMX) zone developed in conjunction with the Twinbrook Master Plan was the first to incorporate the BLT. (In the zoning rewrite, this zone has been transformed into a C/R zone.) Currently the BLT may be utilized for additional density in several zones described below.

To create a BLT for private sale, a land owner must complete an easement form supplied by the County Attorney's office which must be accompanied by specific materials indicating the location, ownership, tax status and zoning of the property as well as a septic system site plan certified by DPS showing the individual septic treatment unit to be extinguished by the BLT easement. It must include a delineation of the 50 foot setback required by DPS for all individual septic treatment units. After appropriate review, the purchaser can verify his desire to purchase and the serial number for the BLT can be assigned by the County Attorney's office and the process can continue for the recording of the easement on the deed. The BLT easement that accompanies a private purchase does not contain the conservation stewardship requirements nor does it contain lot acreage size restrictions for lots subdivided for future development as does an easement generated through public BLT purchase.

TOOLS FOR INCREASING DEVELOPMENT DENSITY

Montgomery County contains very little undeveloped land outside of the agricultural reserve. Planners today are not dealing with how to utilize undeveloped land, but how to meet the goals of the county through redevelopment of already developed areas. Following the General Plan, revitalization of existing underutilized areas such as office parks and strip shopping centers surrounded by surface parking is a goal. Other goals are articulated in various plans adopted by the county such as the Climate Protection Plan of 2009 with emphasis upon energy efficiency through building construction, mass transit utilization and parking limitations and the water quality plans for storm water management and stream protection. A side benefit of redevelopment is the ability to satisfy the commitments made to landowners through the TDR and BLT easement programs.

After years of planning activity, the county's zoning code became so complex, duplicative and inconsistent that a rewrite of the code was undertaken and the rewrite was adopted in 2014. The new code distinguishes between the standard method, which allows development to proceed in accordance with the zoning

regulations, and an optional method, generally used to gain an increase in density, which in the CR and Employment zones requires a sketch plan for development that must be approved by the Planning Board followed later by a Planning Board approved site plan. Public benefits that enhance or contribute to the objectives of the zone must be provided with various benefits assigned a number of public benefit points. The public benefits generally refer back to any goals recommended in the applicable master plan for the site. Points are required from more than a single benefit category in most cases. The number of points required is determined by the zone and tract size or maximum total mapped floor area ratio (FAR), whichever requires more public benefit points.

TDR Utilization: In the rewritten zoning code TDR receiving areas are defined by overlay zones rather than as separate residential zones. TDR overlay zones may be defined in Rural Residential and Residential Zones and for residential development in the Commercial/Residential (CR) and Employment (EOF) zones. Land in a TDR Overlay zone is assigned a density number, as recommended in the applicable master plan that states the maximum number of units that may be built through the purchase of TDRs in the residential zones or the maximum residential floor area ratio (FAR) indicated under the TDR Overlay zone in the others. A fraction of a TDR cannot be purchased; any fraction of a TDR must be rounded up to the next whole number.

A developer may proceed with standard development in the overlay zone or increase density by utilizing the optional method which provides for cluster development or increased numbers of moderately priced dwelling units (MPDU) in residential zones. Development using TDRs must include at least 2/3 of the maximum number of development rights unless the Planning Board finds that a lower density is more appropriate for environmental or compatibility reasons. The residential zone density number can range from 1 to 100 with limits specified in the zoning code based upon the density of the underlying zone and the scale of the development. These factors also determine the type of building that may be constructed. For example, a density number larger than 10 would yield more than 200 units; single family units would not be permitted.

Supported by private market sales, TDRs have existed for more than 35 years and their value has varied with general economic conditions and construction demand ranging from \$4000 to over \$40,000. They provide a significant capability for increased residential density. Historically each TDR yielded one dwelling unit (house or townhouse) of increased density and this is the case today except that two apartment units may be developed for one TDR in most areas. In a Metro Station Policy Area, however, these numbers are doubled except that 3 units per TDR are granted for an apartment building type.

The county planning department has undertaken an analysis of the county's ability to create and utilize TDRs. Some rural landowners are adamantly opposed to placing any easements upon their property so that the actual supply may be less than estimated, but planners are considering ways to meet the county TDR obligation. One option would be to extend the TDR overlay coverage as new plans are developed. Another would be to utilize TDRs as a public benefit in non-residential zones either as a requirement or as an option. Or the county could establish an equivalency of TDRs to BLTs in zones that require BLT utilization. In addition, sun-setting the TDR program would be possible by legislating the termination of TDR creation at some specified date.

BLT UTILIZATION IN OPTIONAL METHOD DEVELOPMENT

Demand for private BLT purchase is generated through the optional method of development in four non-residential zones. In two zones the purchase of BLTs is required as specified in the zoning code. One BLT provides 9 public benefit points. A certain percent of the gross floor area of incentive density must be covered by the purchase of BLTs at the rate of one BLT for each 31,500 square feet of floor area. The zoning code allows up to 30 public benefit points for the purchase of BLT easements or a payment, based on the amount established by Executive Regulation to the Agricultural Land Preservation Fund (ALPF) in lieu of BLT purchase. If a fraction of a BLT easement is needed, a payment based on the gross square footage of incentive

density must be made for at least the fraction of the BLT easement. ALPF money is subsequently used by the county to purchase public BLTs. In all cases a private BLT easement must be purchased in whole units. To date 10 private BLTs have been purchased and 5 payments have been made for partial BLTs. It is estimated that approved sketch plans will ultimately require more than 50 BLTs.

The Commercial/Residential (CR) zone is a mixed use zone of commercial and residential development with a maximum portion designated for each use and the maximum height of buildings defined for each property within the zone in the master plan. An applicant must purchase BLT easements, or make payments to the ALPF, in an amount equal to 7.5 percent of the incentive density floor area. Up to 25 points may be granted for the purchase of BLTs or equivalent payments to the ALPF for any incentive density above 7.5 percent. Payment may be made for a fraction of a BLT.

The Life Sciences Center (LSC) zone was created to encourage the growth of the bio-tech industry, bringing together hospitals, research institutions and bio-tech startups in a mixed use area. In this zone an applicant must purchase BLT easements, or make payments to the ALPF for any incentive floor area above 0.50 FAR. Floor area restricted to the following uses is subtracted from the total density before calculating the required BLTs: workforce housing units; moderately priced dwelling units (MPDUs); hospitals, including the hospital's accessory uses, other than medical office buildings; educational facilities for non-life sciences; life sciences in excess of 50 percent of the project's total floor area.

In the Commercial/Residential Town (CRT) and Employment/Office (EOF) zones, BLT payments are optional; each BLT easement purchase or payment is equal to 9 points, or the proportionate points represented by a fractional BLT payment.

PUBLIC BENEFITS

There are requirements and standards that must be met by any project in a CR, CRT, EOF or LSC zone, including setbacks, public open space, streetscape improvements, residential amenity spaces, bicycle parking and shower facilities, parking facility design and consistency with the applicable master plan and design guidelines. All development must satisfy the standards and requirements in the Montgomery County Zoning Ordinance, regardless of any public benefits provided. During the application process under the optional method of development, an applicant proposes to provide specific public benefits and amenities that support the project's incentive density. The Planning Board will determine whether the proposed public benefits package supports the additional density requested. All public benefits are not specifically limited to the particular project. For example, the BLT must be presented for public benefit points in certain zones, but the effect of the BLT generated from the rural area provides benefit to residents outside of the agricultural reserve, not limited to the project for which the BLT gains incentive density. Granting public benefit points for any amenity or project feature otherwise required by law is prohibited. Essentially the evaluation must establish that a public benefit is consistent with the Zoning Ordinance and the applicable master plan and design guidelines, and is appropriate for the particular context and goes beyond the basic requirements of the zone. The benefit categories are explained in detail at web site

www.montgomeryplanning.org/development/documents/CRZoneGuidelinesFINAL.pdf.

As indicated in the table on the next page, the number of required public benefit points is determined by the scale of the development and the zone defining the type of development being created. Only for small development in the Life Sciences Center zone is a single benefit category sufficient. Otherwise more than a single benefit type is required which promotes reaching more of the goals of the county.

Optional Development Public Benefit Points Required			
Zone	Tract size or FAR	Public Benefit Points	Number of Benefit Categories
CRT	10,000 SF OR <1.5 max FAR	25	2
	10,000 SF OR ≥ 1.5 max FAR	50	3
CR	10,000 SF OR <1.5 max FAR	50	3
	≥ 10,000 SF OR ≥ 1.5 max FAR	100	4
LSC	10,000 SF OR <1.5 max FAR	15	1
	≥ 10,000 SF OR ≥ 1.5 max FAR	30	2
EOF	10,000 SF OR <1.5 max FAR	30	2
	≥ 10,000 SF OR ≥ 1.5 max FAR	60	3

The benefit categories and the associated points available to applicants for optional method development are comprised of:

- a. **Major Public Facilities** – include, but are not limited to, such facilities as a school, library, recreation center, park, county service center, bikeshare station, public transportation or utility upgrade, or other resource delineated in an applicable master plan. Major public facilities provide public services at a convenient location in places where increased density creates a greater need for civic uses and greater demands on public infrastructure. Points may be granted if the applicant conveys land and/or floor area for the facility or constructs the facility or makes a payment towards construction of the facility, depending upon the specifics. Points are limited to a maximum of 20 in an LSC zone, 40 in an EOF or CRT zone, and 70 in a CR zone.
- b. **Transit Proximity** – to qualify for the highest density points, a project must share a property line with or confront a property with a transit station or stop. Further, 100 percent of the tract submitted in a single sketch plan that takes advantage of this proximity must be within ¼ mile of that portal. Points can only be granted for one transit stop with a maximum of 10 points in an LSC zone, 25 points in an EOF or CRT zone, and 50 points in a CR zone.
- c. **Connectivity and Mobility** – includes advance dedication of right of way worth up to 8 points in the LSC zone, 15 points in the EOF zone, and 30 points in the CRT and CR zones; minimum parking- up to 10 points; neighborhood services – up to 15points; public parking – up to 25points; through-block connection, transit access improvement, streetscape improvement, and trip mitigation – each up to 20 points; and way finding – up to 10 points.
- d. **Diversity of Uses and Activities** – includes adaptive buildings – up to 15 points, care centers – up to 20 points, dwelling unit mix – up to 10 points, enhanced accessibility for the disabled – up to 20 points, live/work – up to 15 points, moderately priced dwelling units – 12 points granted for every 1 percent of MPDUs greater than 12.5 percent, small business opportunities – up to 20 points.
- e. **Quality Building and Site Design** – including architectural elevations – up to 20 points, exceptional design – up to 10 points, historic resource protection and public open space – to 20 points, public art – up to 15 points, structured parking –up to 20 points, tower step-back – up to 10 points.

f. **Protection and Enhancement of the Natural Environment** – including BLTs –up to 30 points, cool roof – up to 10 points, energy conservation and generation – up to 15 points, habitat preservation and restoration – up to 20 points, recycling facility plan – up to 10 points, TDRs for a property that is in a TDR Overlay zone, up to 20 points with 1 point per TDR, tree canopy – up to 15 points, vegetated area –up to 10 points, vegetated roof – up to 15 points, vegetated wall – up to 10 points.

g. **Building Reuse** – 75 percent of the structural system of the building must be retained – up to 100 points.

CONSENSUS QUESTIONS

1. Does the League support the public BLT program? If so, how should it be funded?
2. Should some provision be made for private sale of a fraction of a BLT?
3. Should the County adopt a planning goal of creating and maintaining TDR receiving areas adequate to utilize all existing and potential TDRs? And/Or set a termination date for TDR creation?
4. Should a TDR not associated with an overlay zone be utilized as a mandatory or optional public benefit?
5. Should an equivalency of TDRs to BLTs be established for public benefit point use?

ACRONYM LIST

ALPF Agricultural Land Preservation Fund
APAB Agricultural Preservation Advisory Board
AR Agricultural Reserve – both a place and a zoning category
BLT Building Lot Termination – a type of easement providing transferable development rights
CR Commercial/Residential zone
CRT Commercial/Residential Town zone (smaller scale than CR)
DPS Department of Permitting Services
EOF Employment/Office zone
FAR Floor Area Ratio – the number of square feet of developed space divided by the square feet area of land upon which it is built
LSC Life Sciences Center zone
M-NCPPC Maryland – National Capital Park and Planning Commission
MPDU Moderately Priced Dwelling Unit
PHED Planning, Housing & Economic Development Committee of the County Council
R&D Research and Development
TDR Transferrable Development Right
TMX Transit and Mixed Use
USDA United States Department of Agriculture

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