

## **FARMLAND PRESERVATION ORDINANCE v5**

To implement the two “overarching themes” of the 2002 Comprehensive Plan (direct growth to Growth Areas and keep rural areas rural), this Ordinance enacts changes to Chapter 18 that (1) limit development techniques applicable in the Agricultural and Countryside districts and (2) expand opportunities for the sale of transferable development rights by owners of lands in these districts.

### **1. Farmland Development**

Residential development in the AG and CS districts is limited as follows:

(a) Minor subdivision (up to five new lots) and minor site plan (five or fewer dwelling units) are permitted;

(b) Sliding-scale subdivision (one new lot up to the first 100 acres of a site and one new lot for each additional 100 acres) is permitted;

(c) Both of the foregoing development techniques may be used with respect to a single parcel;

(d) Other development techniques, as currently provided, may be used only to the extent that new lots or units created by these techniques do not exceed the number of new lots or units permitted under (a) and (b) above; and

(e) The foregoing limitations shall be applicable to all tracts, lots and parcels of land existing as of September 1, 2008, without regard to any subsequent division or rearrangement of boundaries.

### **2. Transferable Development Rights (TDR)**

(a) In Growth Areas, residential development by subdivision or site plan shall require one TDR for each unit being developed.

(b) The number of such rights (TDR’s) appurtenant to a transferor parcel in the AG and CS districts shall be determined by the provisions of Chapter 18 as they existed on September 1, 2008 (i.e., one right per eight acres).

## DISCUSSION

### 1. Farmland Development.

Allowing sliding-scale development in addition to minor development reduces the impact of the Ordinance on owners of very large parcels. Thus, the owner of a 700-acre parcel would be allowed 7 lots under sliding-scale on top of the 5 lots allowed under minor development. It seems appropriate that the owner of such a large parcel should be entitled to more on-site development than the owner of a parcel as small as 40 acres.

The development of the 12 lots on the 700-acre parcel would not have to meet the cluster requirement of leaving 85% of the parcel in open space, given the underlying zoning of 1/20. In contrast, the owner of a 40-acre parcel wishing to develop more than three lots (two under 1/20, one sliding-scale) would have to cluster to achieve the maximum permitted density of six lots (five under 1/8, one sliding-scale).

### 2. Transferable Development Rights

At present, Chapter 18 authorizes the use of TDR's to achieve 25% increases in the residential densities allowed in the growth areas in several zoning districts. The Ordinance makes no changes in these provisions.<sup>1</sup> Instead, the Ordinance simply adds the additional requirement that for new residential subdivisions or site plans in the growth areas, one TDR shall be required per unit developed. The allowed densities will continue to be whatever Chapter 18 specifies, and whatever State priority funding policy requires, for the particular growth areas in the particular zoning districts.

This simple new requirement will revive the existing, but unused, TDR program already fully worked out in Chapter 18. The existing TDR program is unused because the densities available in the County's Growth Areas are sufficient to satisfy developers' business models without ever having to use TDR's to achieve still greater densities. The Ordinance solves that problem by providing that henceforth all residential units developed in Growth Areas by subdivision or site plan will require TDR's, at the rate of one TDR per unit.

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<sup>1</sup> With respect to nonresidential development in growth areas, Chapter 18 authorizes use of TDR's to achieve increases in floor area and impervious surface ratios. These provisions are also left unchanged by the Ordinance.

The Ordinance, in thus reviving the TDR program, will establish the principle that the profits from development in growth areas must be partially shared with landowners in rural areas who are being asked, for the sake of the welfare of the County as a whole, not to develop their own properties. This principle of fairness, once established in the Ordinance's strengthened TDR program, is likely to endure and produce over time significant benefits to those who farm our rural lands. The extent of those benefits to rural landowners, as compared with these landowners' reasonable expectations of gains from development, is the subject of the addendum to this memorandum.

## **Addendum**

The total number of development rights presently held by owners of AG and CS lands is estimated at 12,500 (based on 100,000 acres of unprotected farmland, at one right per 8 acres). To what extent will demand for TDR's from developers in the Growth Areas satisfy the expectations of these farmland owners, whose opportunities to exercise their present development rights will be curtailed by the Ordinance?

First of all, it is important to note that the opportunities for farmland owners under MALPF and the new County PDR program will be unaffected by the Ordinance. It has been estimated by County staff that MALPF will likely preserve an average of 1000 acres (= 125 development rights) per year for the foreseeable future.<sup>2</sup> The County's newly-enacted PDR program will likely purchase another 20-25 rights per year. Over the next 20 years, therefore, MALPF/PDR can be expected to purchase (and retire) 2900-3,000 development rights (reducing the total inventory of development rights to below 10,000).

Second, there are many farmland owners who wish to continue farming but also want to access some of their "development equity", without trying to put their farm into preservation under MALPF/PDR. Sometimes these owners will want to carve off a lot or two for development. This they will continue to be able to do under the minor and sliding-scale subdivision permitted by the Ordinance.

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<sup>2</sup> In 2008, MALPF preserved about 1300 acres, but in 2009 this total may fall by 50% or more due to declining Agricultural Transfer Tax receipts. At the present time, 75 farm properties totaling 11,047 acres (= 1381 development rights) have been approved for MALPF applications. MALPF easement purchases are highly variable, but the average stated in the text is thought by knowledgeable MALPF personnel to be a reasonable projection.

But, third, there are others, who have not wanted to develop their own properties, but who have instead sold development rights for exercise on other properties under the NCD technique. The Ordinance will sharply curtail (but not entirely eliminate) the use of the NCD development technique, so the question from the perspective of this category of farmland owners is the extent to which TDR transactions can be expected to replace NCD transactions.

In the ten-year period 1995-2005, NCD transactions are said to have “protected” 5032 acres (= 629 development rights) – an average of approximately 63 development rights per year. Is it reasonable to expect, at least after the current surplus of houses and lots is worked down a bit, that 63 units requiring TDR’s will be added annually in the Growth Areas? If it is, then those farmland owners who may have been expecting to enter NCD transactions sometime in the future should have an adequate substitute in the Ordinance’s TDR program. If not, then to that extent expectations (granting, for discussion, their reasonableness) will be frustrated.

It is difficult to quantify, over a 20-year planning period, the demand in the Growth Areas for TDR’s. While the currently unsubdivided land in the six Growth Areas is at present largely under County jurisdiction, much of that land surrounds the municipalities of Centreville and Queenstown (the other four Growth Areas are entirely within County jurisdiction but are more built-out already). These two municipalities have proposed in new or pending community plans to develop (to be sure, over many years) the entire growth area by annexation. For the Ordinance’s requirement of TDR use for development in growth areas to survive annexation, the cooperation of these municipalities will be necessary.

Over 20 years, the cooperation of the two big municipalities may be obtainable through carrots (e.g. County fiscal contributions), sticks (e.g. the 5-year hold), State interventions (e.g. PFA determinations), and joint Town-County community planning for the welfare of the County as a whole as well as the Town. In the near term, it would seem that those portions of the Growth Areas that are under County jurisdiction, and therefore subject to the Ordinance, could generate TDR demand in the modest range of 63 TDR’s per year.

Fourth in the expectations list is that group of farmland owners who are farming only temporarily, in order to offset carrying costs while they hold their properties for eventual on-site development. How large this category of owners

is would be difficult to ascertain – perhaps it is not really very large – but in any case here the reasonableness of the expectations involved can no longer be taken for granted. These owners know that zoning law can change and that 1/8 can become 1/30 or 1/50, as in other Maryland counties. These owners are speculators, or to use a more neutral term, investors – and very few investments in our capitalist society are protected against all risk of loss.

But even the speculators may be partially satisfied by the TDR program, if the Growth Area demand for development rights turns out to exceed what is needed to replace the cornfield village demand for NCD rights. Assuming an expectation, based on the past decade, that lots would have been (but for the Ordinance) created in the AG/CS districts at the rate of 150-175 per year over the next 20 years, one may reasonably expect that some portion of these hoped-for lots may live on as Growth Areas TDR's – if the preceding analysis of Growth Area demand for TDR's vs. lost NCD transactions is as conservative as it would appear to be.

In sum: the Ordinance's TDR program, coming on top of MALPF/PDR, should satisfy the reasonable expectations of owners of County farmland.