Downzoning and Large-Lot Zoning

Zoning is a type of regulation that restricts the uses of land. Downzoning reduces the number of dwellings allowed per acre. To protect farmland, local governments can downzone land to allow less development in that area and require more open space. One of the most restrictive ways to downzone involves altering the zoning to require “large-lots.” A large-lot only permits development on a small area of a large parcel. Even after development, large-lot zoning leaves most of the land as open space. Generally, this helps maintain an area’s rural character by restricting development on large parcels of land. Baltimore County uses downzoning and largelot zoning aggressively to protect farmland from development. It has downzoned most of its rural areas to large-lot zones, which permit development to only one dwelling on 50 acres of land. Baltimore County’s land preservation efforts began with its population growth in the 1950s, which was fueled by white flight from Baltimore City and a newly opened Beltway. A concerted movement to protect the rural areas north of the Beltway led to the creation of the County’s Urban-Rural Demarcation Line (URDL) in 1967, which concentrated development and infrastructure investment south of the line.24 In 1975, Baltimore County downzoned its rural area from a density of one dwelling per acre (1:1) to either one dwelling per five acres (1:5) or fifty acres (1:50). The County downzoned to protect reservoirs that provided drinking water to the Baltimore area, converting large areas of farmland to 1:50 zoning. In 2000, Baltimore County downzoned an additional 10,000 acres to 1:50 zoning. Today, 90 percent of the county’s population lives inside the URDL on only 30 percent of the county’s land.

For more than three decades, local activists and Baltimore County’s frequent rezoning have led to the gradual downzoning of the county’s rural areas, successfully preventing further development. After nearly forty years of residents pushing for downzoning and with much of the area now
zoned 1:50, Northern Baltimore County has little rural land available for development. If zoning in rural areas is not restrictive, it can invite development, and create parcels that are not large enough for economical agricultural use. With more developer-friendly zoning, Charles County and St. Mary’s County do not use downzoning or large lot zoning to protect farmland from development. Both St. Mary and Charles County have a one dwelling per five or three acres in their respective rural preservation areas. Calvert County applies a more stringent dwelling allowance with one dwelling per twenty (1:20) or twenty-five acres (1:25).

A major drawback to downzoning for farmland preservation is that farmers generally oppose the practice because downzoning can decrease their property’s value. Specifically, downzoning reduces the property value of their land, making it harder for farmers to finance agricultural operations or help pay for retirement with their property. As a result, few farmers are members of North County Preservation, a local non-profit organization dedicated to preserving rural land. Organizations that represent farmers, such as the Maryland Farm Bureau, also oppose downzoning. However, studies on property values after downzoning are mixed. Some found no loss in equity after downzoning, while other studies found the opposite. One study compared Baltimore County lands zoned 1:5 and 1:50 and found parcels under the more restrictive zoning worth only $80 less per acre. Another study found that more restrictive zoning in Calvert County slightly increased land values.

Another drawback to downzoning and large lot zoning for farmland preservation is that they do not permanently preserve land for farming. Since zoning codes are subject to change, there is no permanency to the “preserved” open space. Also, opponents of large lot zoning dub the practice as “snob zoning” because only wealthier people - not ordinary farmers - can afford the large parcels of land. However, even if non-farmers buy large lots, they may lease the land to farmers due to two financial incentives. First, the tax rate is lower for agricultural land, which lowers the landowner’s tax burden. Second, some large landowners who want to keep their land as open space can lease land to a farmer rather than pay for landscaping. Also, some residents lease land to farmers because the residents are drawn to the community’s rustic nature.

**Cluster Zoning and Open Space Buffering**

Cluster zoning preserves open space by allowing or requiring denser development to occur on only a portion of the land while the rest remains undeveloped open space. In an attempt to minimize conflict between farmers and non-farming neighbors, open space buffers are placed between residential development and agricultural land. Mandatory clustering generally preserves more open space farmland than optional clustering. Typically, only a small percentage of developers will cluster if it is optional. Lower home values may explain why developers do not opt to cluster. For example, Calvert County’s clustered developments, on average, have slightly lower home values.
While clustering and buffering preserve open space, there are drawbacks. A clustered development may not have enough remaining open space for viable commercial farming. For example, in a clustered subdivision, a homeowner’s association usually owns the open space and may not want to lease the open space to a farmer due to residents’ concerns about farm noise, dust, and odors.54 In addition, as zoning rules may change, the open space preservation is not permanent.

**Right-to-Farm Laws**

A right-to-farm law can protect farming from costly nuisance lawsuits. As subdivisions press into formerly agricultural areas, ordinary farm activities that create odors and noise often spark lawsuits from non-farming neighbors seeking redress such as monetary awards or a court order to stop farming activities. These nuisance lawsuits threaten small farmers because they cannot afford to litigate their claims. Right-to-farm laws help protect farming activities by prohibiting nuisance lawsuits arising from ordinary farming activities and thus shielding farmers from the risks and costs of nuisance suits. According to one county planner, the reviewed counties generally view the right-to-farm laws as a useful farmland preservation tool. Maryland counties individually determine the scope of their right-to-farm protections. The tri-counties grant their residents a right-to-farm if the activity is a generally accepted agricultural practice. Baltimore County does not provide a right-to-farm unless the land is located in a Resource Conservation Zone.

**A Brief history of TDRs**

Zoning was the first widespread attempt to balance individual property rights against the good of society. Early advocates also suggested that zoning would enhance property values (Karkainen, 1994). In 1916, New York City enacted the nation’s first comprehensive zoning ordinance after a spate of skyscrapers blocked sunlight from neighboring properties. At the same time, warehouses and factories were encroaching on fashionable retail areas of Fifth Avenue. The new zoning ordinance set both height and setback requirements and separated incompatible uses, such as factories and residences (City of New York Department of Planning, 2002).

From the beginning, critics complained about the unfairness of zoning since it benefits some landowners and limits others. In 1926 the U.S. Supreme Court ruled in the landmark case of *Village of Euclid, Ohio v. Ambler Realty* that the legal system recognizes many kinds of unequal burdens (Karkainen, 1994). The *Euclid* case required two hearings before the high court narrowly affirmed a community’s ability to zone. (Callies, Freilich and Roberts, 1999)

The idea of transferring development rights between properties was first introduced in New York City with the passage of that first American zoning ordinance in 1916. It allowed landowners to sell their unused air rights to adjacent lots, which could then exceed the new height and setback requirements. In 1968, the city Planning Commission changed the rules to allow transfers between lots several blocks apart (Johnston and Madison, 1997).

In the early 1980s, the command and control nature of many regulations came under fire as an inefficient. Policy makers searched for ways to govern using the market (Henig, 1989-90). In 1986, Australia created a system of tradable permits to stabilize lobster populations. During the first half of the 1990s, a system of tradable pollution credits in the U.S. cut emissions of sulfur dioxide (which causes acid rain) in half (Brown, 2001). With these successes, market advocates found the world moving in their direction—toward answering all kinds of societal questions with economics. Land uses proved to be no exception.

**Transfer of Development Rights Programs**

**Using the Market for Compensation and Preservation**

Jason Hanly-Forde, George Homsy, Katherine Lieberknecht, Remington Stone
**Transfer of Development Rights**

A Transfer of Development Rights (TDR) program allows landowners living in a “sending area” to sell their land’s development rights to landowners in a “receiving area” where they can use the transferred rights to build at a higher density than ordinarily permitted. In the context of farmland preservation, the county designates farmland as a sending area and a designated growth zone as a receiving area. When a farmer sells a TDR, a conservation easement protects the land that generated the TDR from any future development. By selling and transferring their land’s development rights, farmers preserve their farmland, while capturing part of the land’s development value. Maryland law authorizes counties to establish TDR programs.

There are, however, several drawbacks to using TDR programs for farm preservation. Since TDRs are an unfamiliar concept to most residents, counties must spend money to educate the public about the program to encourage participation. The pace of TDR preservation depends largely on the strength of the real estate market, since fewer developers buy TDRs during a weak housing market. Designating areas to receive development can be difficult if communities oppose TDRs that permit higher-density development in their neighborhood. Lastly, administering a TDR program with the right balance of incentives so that both farmers and developers participate can be difficult. TDRs must have a sufficiently high price so that farmers will sell a TDR that extinguishes their development rights, but not so expensive that developers will not purchase them. Counties that wish to strengthen TDR demand may need to alter their comprehensive zoning plan. For example, if a county downzones, developers have more incentive to buy and use TDRs if the receiving area is the only designated area for high-density development.

**Conservation Easements**

A conservation easement program purchases development rights from a willing landowner and permanently prohibits any future development. Agricultural conservation easements allow for continued agricultural use of the land, while permitting a farmer to capture the land’s development value. This allows farmers to continue farming and realize the land’s development value, making conservation easements popular with farmers.

Maryland and its counties jointly administer the state’s conservation easement program, the Maryland Agricultural Land Preservation Foundation (MALPF). For a property to be eligible for MALPF, it must: (1) be at least fifty acres or border already preserved property; and (2) meet a productive soil or forest requirement. The program pays the farmer the fair market value minus the agricultural value of the land. If a county has a state-certified land preservation program, then the county pays 40 percent of the easement costs with the state paying the rest. Once the landowner signs the conservation easement, the land is permanently prohibited from commercial, industrial, or residential development. As of December 2009, the program has acquired the following acreage in each respective county: 22,460 acres in Baltimore County; 4,753 in Calvert County; 6,765 acres in Charles County; and 10,476 acres in St. Mary’s County.

While conservation easements permanently protect land from development, they are expensive for counties to administer. Maryland easement programs are funded by a state-imposed tax on agricultural land that is sold and transferred out of agricultural use. When the housing market is strong, counties have
more transfer tax revenue, although higher land values also increase the cost of conservation easements. A weak housing market lowers the county’s cost of purchasing an easement, but also lowers the agricultural transfer tax revenues for both the state and its counties. Charles and St. Mary’s counties illustrate how a weak housing market negatively impacts a county’s ability to purchase conservation easements. Currently, farmers wishing to sell a conservation easement are on a waiting list in Charles and St. Mary’s counties because of the lack of easement funding.

Maryland’s Rural Legacy program is another way for the state to fund county conservation easements or development right purchases. As part of its 1997 Smart Growth initiative, Maryland started the Rural Legacy program to help create large, contiguously preserved areas to create economics of scale for farmers. Under the program, counties apply to designate parcels as a Rural Legacy Areas. After state approval, the counties apply annually for state funds to help with land preservation in the Rural Legacy Area.

Despite the program’s name, the focus is not primarily agricultural preservation; it also aims to preserve woodland, rivers, ecologically important areas, and archeological sites. A recent study found that the Rural Legacy Area designation alone does not discourage development compared to land outside Rural Legacy Areas. However, the additional state funds helped preserve more land.

**Taxation**

Maryland uses various taxation programs to encourage farmland preservation by incentivizing residents to preserve land for farming. These taxation tools are discussed below.

**Agricultural Transfer Tax**

Maryland imposes a 0.5 percent transfer tax on sales of agricultural land unless the purchaser keeps the land in agricultural use for five years. The tax aims to discourage the development of farmland. While the tax provides an incentive to keep land in agricultural use, developers likely view the tax as an incidental business expense if profits from conversion significantly exceed the tax penalty. Despite this drawback, the transfer tax is important because the counties use it to fund land preservation programs.

The budget of county land preservation efforts largely depends on revenues from the Agricultural Transfer Tax. If a county’s land preservation program is certified by the state, a county keeps 75 percent of locally generated transfer tax revenue, while uncertified counties retain only 33 percent of the revenue. Certification requires demonstrating that the county has developed and maintained an effective land preservation program. Baltimore, Calvert, Charles, and St. Mary’s counties all have certified programs. Some counties levy a higher transfer tax to increase funding to their land preservation programs. For example, Baltimore County charges a 1.5 percent transfer tax, while St. Mary’s imposes a 1.0 percent tax. Not all counties have certified preservation programs, in part because the costs of certification may be greater than the expected additional tax revenue.
Differential Taxation

Maryland counties tax agricultural land according to its agricultural value. Since the market value of the land is generally higher than its agricultural value, this lowers a farmer’s tax burden. This may make agricultural activities relatively more profitable, providing farmers with an incentive to continue farming. The tax incentives can also encourage non-farming landowners to open their land to agricultural production. Some landowners lease land to farmers to reduce their property taxes to the lower agricultural rate. Differential taxes are a valuable component to a comprehensive land protection program, but there is no assurance that the beneficiaries of the tax will keep the land in agricultural use.