

Achieving Sensible Agricultural Zoning to Protect PDR Investment

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Good morning.

In the United States, 800,000 acres of farmland have been preserved through the purchase of development rights, known as PDR programs, at a cost to taxpayers of \$1.2 billion. Farmers in more than 250 localities nationwide can participate in these programs, which protect farmland from development in perpetuity. Some of the local governments that implement PDR programs have enacted effective agricultural zoning as a first line of defense against over-development of agricultural areas, but most do not.

What is "effective" protection when it comes to agricultural zoning?

Effective agricultural zoning does two things: 1) it promotes and otherwise helps agriculture be productive and profitable, and, 2) it protects productive lands, the resource upon which agriculture depends, by placing limits on both the type of development and the amount of development that can happen in agricultural areas.

An agricultural protection ordinance will not allow activities that fragment agricultural lands such as airports, golf courses and residential subdivisions. Agricultural zoning recognizes that if too many homes are built in a farming region, a suburban lifestyle will begin to supplant the rural way of life and farming practices will go from being accepted to being resented. In time, all the farmers may sell out.

The aspect of agricultural zoning that I will address is density allowances – that is, how many new homes are allowed to be built on how much land? This is particularly important in localities that are spending significant amounts of public funds on preserving farmland.

Since it is primarily local governments, and not state governments, that govern land use, the focus here is on local governments, dozens of them here in the Mid-Atlantic, and the relationship between their PDR programs and their agricultural zoning.

It is apparent to me, after 11 years of reporting on this issue, that some local governments are spending millions of dollars on PDR in an attempt to buy their way out of bad zoning. But an effective farmland preservation program is not defined by the number of dollars spent, or even by the number of acres preserved. It is defined by the combination of techniques used, because over time the strength of one technique can compensate for the weakness of another. For example, a weakness of the purchase of development rights, also known as the purchase of agricultural conservation easements, is that it costs a lot of money. You may never have enough money to protect all the farmland you think is needed to keep your local ag economy strong. That's why agricultural zoning is needed. It should be used as the first line of defense against conflicts with nonfarming neighbors. Agricultural zoning, in fact, makes PDR more affordable and more successful.

Many local governments in the mid-Atlantic states have spent millions in both state and local dollars paying landowners not to develop their land. Amazingly, at the same time, they are inviting developers to build residential subdivisions around these preserved farms. At some point in the not-too-distant future, these localities will have to evaluate their approach to farmland preservation, and they will do one of two things: they will either get together with their landowners and discover that agricultural zoning is not so bad as they thought, or, they will continue their avoidance behavior and face the consequences of having all or most of their preserved farms surrounded by suburban subdivisions in what will ultimately be a failed experiment in land use governance.

Some localities will tell you that agricultural zoning has become impossible because land values have escalated to a point that any level of downzoning would result in unbearable takings claims. But these are assumptions, not facts. It is not necessarily a fact that the fewer homes you can build on your land, the less money you will make when you sell that land. More about that in a few minutes.

For now, let's have a quick ag zoning refresher.

First, every state has a zoning enabling act. Nearly every state expressly authorizes localities to use agricultural zoning. About half of all states have at least some localities that have enacted agricultural protection zoning. These states are across the northern half of the nation, but excluding New England and New York.

I am sure most of you understand the relationship between planning and zoning. Agricultural zoning depends, for its legal standing, on stated public policy goals, in this case, the preservation of agriculture.

An ag zoning ordinance can do a lot of things, such as allow farm-based businesses, provide a nuisance disclaimer that warns new residents about farming practices, establish setbacks from property boundaries for new farm buildings, and, determine how many new residential structures can be built on a given amount of acreage.

We are concerning ourselves right now just with the last of those. It deals with lot areas and subdivisions.

There are basically two types of what is called nonexclusive agricultural zoning: minimum lot size and area based allocation.

Under minimum lot size zoning a farm can't be broken into parcels below a certain number of acres. The idea behind this type of zoning is to make the parcel big enough so that it is unaffordable as just a home site (although this is a big variable depending on your local land market), and minimum lot size zoning helps to keep farmland in blocks large enough to farm. This type of zoning works best in areas where farming is predominant, but localities have to make sure that the size of the lot is related to the average size farm to make it legally safe in the courts.

In area-based allocation, the number of allowed nonfarm dwellings depends on the size of the parcel, and lots can be as small as the minimum allowed, usually one to two acres.

There are two types of area-based allocation: fixed area and sliding scale.

Under fixed-area based allocation, the most common here in Maryland, a certain number of new homes are allowed per number of acres, such as one home per 20 acres or portion thereof, as in Carroll County, or, one home per 50 acres, as in Baltimore County. In this example, 4 lots have been subdivided off a 100-acre farm in a 1-25 zone.

Under sliding scale, the larger the tract, the fewer number of lots allowed per acre. For example, in Clarke County, Va., a 14-acre parcel is allowed one dwelling unit, and a 100-acre parcel is allowed four, not seven as would be the case if one lot was allowed per 14 acres.

Now let's look at some counties that spend big bucks and make headlines for acres preserved, but hide their zoning in the back room.

Carroll County, Maryland has spent to date \$26.7 million of its own money, ranks in the top five of counties nationwide for number of acres preserved, and yet, has base agricultural zoning of 1:20, with opportunities for additional lots that results in an overall density of 1:15 – not enough protection for the commercial agriculture county leaders say they are determined to retain. A clustering provision would allow from three to six lots on every farm, something that can be fully expected to occur over time unless county commissioners take another look at what they've done.

The Maryland Department of Planning rates Carroll's agricultural zoning as "moderately protective." The only reason it gets this high a rating is that there are counties with worse zoning.

One of those is Harford County, which the Maryland Department of Planning calls "least protective." Harford has spent or committed a total of \$46.5 million of its own funds to operate an innovative PDR program that is more sophisticated and more attractive to farmers than the state's PDR program. Harford proudly ranks 8th in the nation for number of acres preserved. Yet elected officials think they are protecting the interests of farmers by holding on to one of the most permissive agricultural zones in the nation in terms of density allowance: a preposterous ordinance that allows, first, one building right per 10 acres per deed, then, for those owners whose deeds predate the ordinance, an additional building right for almost every member of the extended family – that is, living parents of each owner, all living brothers and sisters of each owner, and all living children. These relatives don't have to live there – they merely have to sign affidavits proving they are alive and the owners can subdivide an additional lot in their name. The resulting density works out to about 1:5 or maybe 1:6. Harford County is spending lots of money on farmland preservation, and at the same time is virtually assuring that many, and perhaps most, preserved farms will be surrounded by development, and many of those lands will be developed at densities entirely incompatible with commercial agriculture.

None of this means that PDR should not be going on in these counties. County governments are entirely within their prerogative to pursue any degree of farmland preservation they deem worthwhile. But at some point it may become evident that preserving farmland for the future of farming is not what happened, and what happened instead was suburban subdivisions interspersed with large, exclusive estates that used to be working farms. If a county is getting close to build-out, it may be impractical to pursue downzoning. But that's not true for either Carroll or Harford, or, I believe, most counties that have active preservation programs.

It is important that the public be aware of the financial investment that is being made and what it will mean to see that investment essentially wasted as the goal of preservation is not met due to zoning that negates the purpose of PDR.

We know in the business world that if you don't clean up your own inefficiencies, someone will do it for you, and you may not be happy with the results. That is exactly what might happen here in Maryland. The state has been sending money to its counties for PDR since 1977, and is only now beginning to take a look at where its money is going. A task force assigned to examine the state farmland preservation program is strongly advising the General Assembly and the governor to award well-zoned counties with priority status when giving out farmland preservation dollars.

Every summer, *Farmland Preservation Report* surveys all of the leading PDR localities to see where they stand in number of acres preserved. For the past seven years we have named the

Top 10 counties, and this year named the Top 12 because some newcomers were so close to the Number 10 spot. Here I've listed some of those counties along with their agricultural zoning.

A few years ago I challenged my readers to think about which counties on this list will ultimately be the more successful in protecting farmland and farming. Will it be the ones with the most acres preserved through PDR, or will it be those that have, maybe, not as many acres under easement, but have more restrictive zoning? For example, will Montgomery County, with more than 53,000 acres preserved and 1:25 zoning be more successful at farmland preservation than Marin County, which trails by 20,000 acres but has 1:60 zoning?

People in the land preservation profession don't think PDR should be a stand-alone technique. They believe very strongly that the purchase of development rights, to be successful in the end, needs to be accompanied by effective agricultural zoning – zoning that protects the investment made, and, protects the integrity of the effort overall.

So what is effective agricultural zoning? It is zoning that will protect the type of farming that is occurring in a given community. When considering the level of density that should be allowed, look first at your average size farm. Let's say the average size farm is 50 acres. Can farming still take place if one house is built there? What about two houses? This is something for the community to decide.

In Lancaster County, Pennsylvania, every township has adopted zoning that restricts nonfarm dwellings to one unit per 25 acres.

In Baltimore County, the density allowance in the Resource Conservation District, known as RC-2, is one dwelling per 50 acres.

Many townships in York County, Pennsylvania have 1:25 zoning, including sliding scale zoning. In fact, sliding scale zoning was invented in York County about 25 years ago and first enacted in one of its townships.

Marin County, California, is famous in the PDR world for its 1:60 zoning, which it enacted as part of a very determined farmland preservation effort in the early 1970's.

Montgomery County, Maryland, is well known in the preservation field for its transfer of development rights program, or TDR, and its 90,000-acre agricultural preserve. After TDR, the remaining density allowance is 1:25.

Each of these examples can be considered effective agricultural zoning because, they have stood the test of time, that is, relatively few rezonings have occurred, the zones cover areas large enough to sustain an ag industry, and because in most cases farms can't be broken up into parcels that are too small to farm, and finally, complaints from nonfarm neighbors are minimal or nonexistent.

If your locality does not have agricultural zoning and wants to establish it, I will refer you to the book that I co-authored with Tom Daniels called *Holding Our Ground*, which contains a good chapter on agricultural zoning and some advice on how to get started.

But today I want to concentrate on the idea that even after a locality has had agricultural zoning, even for many years, it is just as important to revisit that zoning to see how it is working. If the zoning isn't doing its job well enough, than it needs some adjustments.

Baltimore County is certainly a "Profile in Courage" when it comes to land protection. In 1976 the county downzoned a full half of the county, about 200,000 acres, from an allowed density of one unit per acre (1:1) to two zones of either 1:5 or 1:50. This was not done for farmland preservation, but to protect the water quality of three major reservoirs that provided drinking

water to the Baltimore region. These two zoning densities were mixed, allowing for development into the rural areas, but keeping large contiguous farming regions together with the more restrictive 1:50 zoning.

But as Baltimore County's farmland and environmental protection programs increased and matured during the 1980s and 1990s, it was felt that further protections were needed to accomplish new preservation goals.

In 1996, during an update to the master plan, the Baltimore County Planning Board proposed downzoning 12,000 additional acres from the 1:5 density to the 1:50 density to protect the county's prominent farming regions from further encroachment. You may find this hard to believe, but there wasn't a lot of opposition to this proposal, but farmers wanted the equity issue addressed.

And, so it was addressed in the most direct way, as I am about to explain.

The idea that a landowner may lose equity when the density allowance on his or her land is decreased, is a serious issue. It seems to me that ever since zoning was invented it has been assumed that the more homes you can build, the more money you will make, or, the fewer homes you can build the less money you will make.

But, again, this has always been assumed, and maybe it used to be true, but times change and so does the land market. Occasionally, a study has been done on whether decreased density allowances affect profit in land sales, but as far as I can tell, it wasn't until 1996 that such a study had a direct impact on a downzoning proposal. The Valleys Planning Council of Baltimore County, a nonprofit land use watchdog group was working hard to support the downzoning. The executive director at the time, John Bernstein, now with the Maryland Environmental Trust, took on the job of disproving the lost-equity claim.

Bernstein and his staff studied land sales on 154 parcels of at least 10 acres that were located in preservation areas. They added up all the sales and did the math and found that parcels zoned for 1-50 sold for an average of \$7,097 per acre, and parcels zoned for 1-5 sold for an average of \$6,282 per acre.

They looked also at larger, developable parcels as a group, separating out those of 60 or more acres. They found the difference in per-acre averages between the lesser density of 1-50 and the greater density of 1-5 was miniscule for these properties: In the 1:50 zone, the average parcel size sold was 113 acres and the average cost per acre was \$6,335. For the 1:5 parcels, the average parcel size sold was 120 acres, with an average cost of \$6,255 per acre. The Valleys Planning Council had the data checked by a consulting group, which confirmed the numbers and stated there was no significant difference in land values between the two zones.

The difference was just \$80, but the important thing is, the assumption that parcels with more restrictive zoning would net less money was proved false, and in fact, the parcels with the more restrictive zoning not only competed with the 1:5 parcels, but actually sold for a little more per acre, on average.

I know that land sales data for Baltimore County may be a whole lot different where you are. But the lesson will still ring true all around: test your assumptions. Maybe your farmers are right to be concerned about the loss of equity if you propose a downzoning, but maybe they are wrong. Someone just needs to do the math.

Larry Libby asked me to talk about trends I see that have to do with the regulatory side of farmland protection. Well, what John Bernstein did is probably the most exciting thing that I have seen happen in regulatory farmland protection in the last 10 years and I wrote about it in some detail in Farmland Preservation Report. But the story doesn't end there, because one incident

does not a trend make – to call something a trend, you have to have it happen again, preferably somewhere else.

Well, as it happened, I received a lot of phone calls about that story – in fact, if I had to name my Top 10 Stories for the first 10 years of publishing my newsletter, this story would be near the top in terms of reader interest. One subscriber in Calvert County, Maryland – Greg Bowen - read that story about John Bernstein's data with particular excitement, and called me with some questions about it. Calvert County was about to update its comprehensive plan, and the county was facing tremendous growth pressure from Washington, D.C. that would require major road improvements and at least one new school. The county did a smart thing: a build-out study was conducted that showed the county could expect another 54,000 homes to be constructed under existing zoning. Then, the county did another smart thing. It produced a full-color newspaper-type publication and sent it to all residents, and when people got the news about what Calvert County was going to be like, and how much it was going to cost, they agreed that something had to be done.

At public hearings, residents overwhelmingly told officials they wanted to reduce buildout significantly, avoid new school construction, and avoid major road improvements that had been identified as necessary to accommodate the expected growth.

As part of this effort, Greg Bowen did some figuring of his own, comparing agricultural zoning in Maryland counties with per-acre appraisals within those zones, and could find no correlation between zoning densities and land values. In fact, Bowen's data showed that counties with more restrictive zoning showed higher, not lower, market value for land. In this chart, the numbers on the right show per-acre values and the bottom numbers show densities. Counties are represented by colors shown on the right.

So just two and half years after the story about the Baltimore County study appeared, I was writing about Calvert County enacting the first countywide downzoning to happen in Maryland in 20 years. It wasn't as dramatic as Baltimore County's, going from 1:5 to 1:50, but it was dramatic in terms of its coverage – the entire county decreased its potential density by half, affecting all zoning districts. In Calvert's agricultural zone, allowed density went from 1:5 to 1:10. Not great, but certainly better.

And the campaign to support this downzoning was effective and systematic: Calvert County officials basically employed a set of build-out scenarios, and asked residents what they preferred. First option: a 25 percent density reduction and a *postponement* of needed highway improvements. Second option: a 50 percent density reduction and the *elimination* of the need for major highway improvements and a new high school. At a public hearing on the comprehensive plan, residents said they favored the latter option – the 50% option, and a stronger effort to save farmland and to save money in a big way.

That was in the spring of 1999. In 2000, as I showed earlier, Baltimore County, during its most recent master plan update, downzoned an additional 10,000 acres to the 1:50 density. So now that's three major downzonings in Maryland, so I think we can call that a trend, especially considering that the equity issue was addressed, apparently to the satisfaction of landowners affected.

Add to this the State of Maryland's Smart Growth policies that are leaning ever harder on counties to rethink regulatory means for protecting farmland, and maybe we can predict that this trend will continue, at least here in Maryland. But don't think downzonings can only happen in Maryland. They have happened elsewhere – in Pennsylvania and Washington state, in Illinois and in California. The important thing for you to remember about the Baltimore and Calvert County stories is that build-out scenarios and land value studies have been done before, and are very transferable, and hopefully, are coming to a locality near you.

