

Planning Board

Public Hearing
January 15, 2009

Proposed amendments to
Baltimore County Zoning Regulations
pertaining to operation of
creameries in RC Zones



Presented on behalf of
North County Preservation, Inc
by
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North County Preservation Position

The mission of North County Preservation, Inc. is to support rural life in northern Baltimore County by promoting responsible development and preservation, with a careful balance between potentially competing ideals.

In furtherance of that mission, NCP supports efforts to promote the viability of agricultural interests throughout the north county area to the extent that those efforts are compatible with the NCP goal of environmental preservation. We recognize that value-added processes and businesses such as creameries are essential to the survival of locally owned farms and that the survival of those farms is essential to the preservation of the rural character of our area.

NCP has extensively examined the proposed legislation and finds that there are a series of shortcomings with this draft, making it inadequate to address all of the aspects of the immediate issue, including insufficient protection for both existing agricultural interests as well as for other appropriate uses in the rural area.

Without extensive changes, the resulting code would lack sufficient protection both for agricultural uses from nuisance complaints from nearby, non-residential uses and for non-agricultural uses from adverse effects of unintended agricultural uses.

Therefore, NCP recommends that the presently proposed legislation be tabled and that a committee be formed, along the lines as originally proposed by third district Planning Board member, Wayne McGinnis - preferably under the Planning Board, to fully address the overall issue of zoning regulations in the principle agriculture zones, mainly RC-2. The committee should consist of:

- Planning Board members
- County Council members
- Representatives of the applicable County departments (Planning, DEPRM, PDM, legal)
- Environmental experts and agricultural engineers
- Representatives of agricultural interests and community associations
- Members of agricultural organizations (Farm Bureau, Soil Conservation District)

We believe that a comprehensive examination and discussion of all of the issues related to the bigger question will result in a mutually agreeable solution which benefits all of the communities of interest in the rural portions of the county, especially the agricultural base which is so important to our vision of the future for this area. This process would result in an agreement on the numerous smaller issues such the present question concerning creameries.

(Such a committee, if charged with a concentrated effort, should be able to complete an initial draft or framework within 3 months, in preparation for the appropriate public hearings.)

NCP stands ready to assist in this effort and, to this end, we have attached detailed comments regarding the present draft, both to indicate the level of problems with that draft and to suggest possible corrections.

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NCP Summary of Proposed Bill and Issues

The stated purpose of the draft bill is to protect the County's agricultural industry so that the area maintains its importance as an industrial base for the farming industry. Additionally, it will promote the use of local, fresh products by County citizens as well as decrease our contributions to global warming.

The draft bill:

- Defines "creamery" as an "establishment" where dairy products are made or made and/or sold.
- Allows creameries, by right, in RC-2, RC-3, RC-4, RC-7, RC-8, and RC-50. Not allowed in RC-5, RC-6, RC-20, or RCC. (Presently allowed only in ML.)
- Allows sale of locally produced creamery products at Farm Market and Farmer's Roadside Stand.
- Adds protection from nuisance complaints against agricultural operations by residences in all RC zones besides present RC-4, RC-7, and RC-8 zones.

While the central issue of whether or not to allow creameries in most RC zones tends to receive the most attention, there are other issues brought about by the draft legislation (and the existing code) which require examination and correction.

The detailed comments we are providing fall within two broad categories:

Protection for agricultural interests

Additional protection for agriculture is needed for the following:

- The present BCZR provides agricultural operations with protection from "nuisance" complaints by residences in nearby RC-4, RC-7, and RC-8 zones, regardless of the zone of the agricultural operation. The proposed change to this "protection clause" adds this protection from complaints by residences in all other RC zones. However, it does not provide protection from complaints by non-residential uses in these and other adjacent zones, such as businesses and churches. This should be added to properly protect agricultural activities operating in all appropriate agricultural zones.
- The proposed definition of "creamery" and other text might be misinterpreted to place additional restrictions on existing dairying operations. Since this is clearly not the intention, appropriate wording should be added to prevent this.

Protection for non-agricultural interests

Much of the opposition to creameries might be alleviated if appropriate restrictions and protections are included in the bill for the following:

- Other than the 2-acre limit, there are no restrictions placed on creameries, as there are for other agricultural-related activities such as farmer's roadside markets and wholesale flower farms, as well as for the recently allowed museums in RC zones.
- While Federal Regulations control or limit what a creamery could do based on its classification, there is no clear reference in the draft which would apply the appropriate regulations in order to prohibit shipping in milk from distant places for the production of products.

- Residences in zones specifically defined for residential uses (RC-5 and RC-6) should continue to be able to initiate nuisance complaints due to agricultural sources in those same zones as is presently the case. The proposed changes to the BCZR for those zones are outside the scope of changes required to allow creameries.

NCP Proposal

Because of the large number and complexity of issues and the many interests involved in the outcome, NCP proposes that the Planning Board convene a committee, made up of Planning Board members, County Council members, representatives of applicable county departments, environmental experts, agricultural engineers, representatives from agricultural interests and community associations, and agricultural organizations to draft a comprehensive bill, using the Office of Planning's draft as a starting point, the attached comments, and additional inputs from interested parties.

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NCP Detailed Review and Comments on Draft Legislation

North County Preservation has extensively reviewed the Office of Planning's Staff Report on Amendments to the Baltimore County Zoning Regulations pertaining to creameries, as amended January 7, 2009. As a new piece of legislation which could potentially result in years of conflict, hearings, and court cases to determine its meaning and application, it is extremely important to carefully review it for potential loop-holes or misinterpretations. Thus, the NCP review has left no stone unturned in considering unintended consequences in the interpretation of the intent and letter of the resulting changes to the BCZR (as well as in the current code in its associated parts).

In order to assist in a possible amicable resolution of this issue, we offer the attached comments, providing both an explanation of the problem as well as detailed suggestions for modifications to the proposed bill, in the hopes that the result will further enhance the cooperation and coexistence among agricultural, business, residential, and non-residential uses in the rural portions of the county.

Note: In the following comments, where changes to the Staff Report are proposed, those suggested changes are indicated as follows:

The staff report, where unchanged, is shown in its original format, with original text from the BCZR in normal font, text added indicated in **bold**, and deleted text shown ~~crossed-out~~.

Changes propose by this memo are shown with additions as underlined and deletions as ~~double struck through~~ with both highlighted in red (in original).

Zones for creameries

The Staff Report proposes that creameries be allowed "as of right" in RC-2, RC-3, RC-4, RC-7, RC-8, and RC-50. It should be noted that many other "agricultural-support" activities such as a farm market, firewood operations, wineries, bottled water plants, sawmills, and feed or grain driers require special exceptions in these same zones, or are not allowed at all in some.

Some of these zones might be inconsistent with a creamery, for example:

- RC-3, which is intended for rural development "to foster conditions favorable to agricultural and residential use" for about a thousand acres, mostly in the southern part of the county in the 4th and 6th district, with very few remaining parcels large enough to support dairying.
- RC-7 and RC-8, which are intended to preserve the rural area by "limiting the scale and intensity of development".
- RC-50, which is intended to protect the Chesapeake Bay (and which is relatively small and only in the 5th, 6th, and 7th Districts)

For some zones, because of their special nature and purpose, it may be desirable to require a special exception. It is possible, for example, that "as of right" might only be appropriate in an RC-2 zone (making up a majority of the rural area), while RC-4 might be by special exception.

The special exception process provides an opportunity to weigh the benefits and detriments of a proposal in certain cases, and allows for additional restrictions to placed when called for. Of course, this needs to be balanced against the cost of the special exception process to the farmer, both in money and delay, since special exceptions are rarely denied anyway.

However, even allowing creameries in RC-4 requires careful consideration, since RC4 is designated to protect the watershed of three regional reservoirs which provide water to metropolitan Baltimore (including large parts of the County) by preventing contamination through unsuitable types or levels of development in the watersheds. Baltimore county has an obligation to the general public for maintaining these waters as demonstrated by signing the second regional watershed agreement in December 2006 with Baltimore City. By signing this agreement, Baltimore County has pledged to continue its cooperative commitments to ensure that development is consistent with watershed management plans, including identifying ways to "incorporate greening into development regulations".

(Note: The amount of RC-4 zoning in the 3rd district has dropped significantly since pre-2004 by the rezoning of large amounts to RC-7 and RC-8 during the 2004 and 2008 CZMP. There are now less than 10,000 acres remaining in RC-4 in the 3rd District and about the same in the 2nd and 4th Districts combined.)

One of the primary tasks of a committee formed to examine this issue is to consider all issues for each zone and each potential agricultural-related use such as the amount of each zone existing, the probability of that use being desired in that zone, and the special considerations which that zone deserves for environmental protection. The committee would then make a recommendation on allowed zones for each use.

Creamery Definition

The definition of "creamery" needs to be made consistent with (or simply reference) the definition found in the Federal Regulations, since that is the basis for most of the limits on what such a business is allowed to do.

The proposed definition of "creamery" leaves some ambiguity because of the use of the word "or" and the existing definition in the BCZR that "or" means "and/or", itself a completely ambiguous term. It would be possible to interpret the resulting definition as meaning that any establishment where processed dairy products are "sold", but not made, is a "creamery".

Further, the definition of "creamery" could be interpreted to include a farm where cows are milked and where the milk is processed for delivery to the wholesale market, as these processes are being performed today. This could lead to unintended restrictions.

In addition, the proposed definition of "creamery" leaves some ambiguity on how to apply the limit on area. A "creamery" is defined as an "establishment" rather than a "building", which implies that it includes all associated sales and work areas, even if outdoors or as a part of a separate "farmer's roadside stand". (Such stands do not have an area limit.) It is unclear whether the 2-acre limit is just the building, includes outside work area, or includes parking. This needs to be explicitly defined.

Unless, defined by a reference to Federal Regulations, the proposed definition should be modified as follows:

Creamery -- ~~An establishment~~ Any building, structure and the adjacent land where dairy products such as ~~milk~~, butter, cheese, ice cream and yogurt are made ~~or where dairy products prepared or sold~~. Creameries in R.C. zones are only permitted in conjunction with commercial agriculture or a farm.

(The final sentence is moved to the new Section 404.13.)

Creamery Regulation

Some opposition to creameries in RC zones is no doubt the result of fears that they could develop into nuisances as some other allowed "agricultural" activities have in the past. For example, a winery holding numerous, loud, outdoor concerts attended by a thousand people can be a nuisance, but might be considered as being a protected activity by the present code. Addition of appropriate restrictions could help to minimize some of the opposition to creameries.

Other than the limit on the total area used for processing, packaging, and marketing, the Staff Report contains no proposed restrictions on creameries to protect neighboring properties, even adjacent residences, from the potential of excessive commercial operations. In the case of other agricultural support activities allowed in RC zones, there are specific sections to describe the restrictions. For example, restrictions for wholesale flower farms, nurseries, landscape services, farmer's roadside stands, and firewood operations are included in Section 404. In addition, the recently enacted legislation to allow museums in RC zones included numerous restrictions in 402D to prevent possible misuse.

There is no minimum size farm on which a creamery could be built (other than the implied 3 acre limit on the definition of "farm"). While there is certainly a reasonable minimum size for an efficient dairy farm, the code should state a minimum, just as it does for a winery in an RC-5 zone and for a museum. If the minimum were set at 20 acres or above, then there would be no need to state the creamery area as "10% or 2 acres, whichever is less". Simply stating "2 acres" would then suffice.

In order to sufficiently include restrictions which apply to all zones, the statement for each zone should be modified to simply state the following and should be placed in the section for "as of right" or "special exception" as appropriate for each applicable zone.

Creamery, subject to the provisions of Section 404.13.

and a new Section 404.13 should be added to describe the various restrictions such as area, setbacks, hours of operation, parking, use for other events, similar to what was added in Section 402D for museums in RC zones.

404.13 Creameries are subject to the following requirements:

A. A creamery is allowed only as an accessory use to a commercial agriculture operation or a farm property with a minimum area of ??? acres on which the overall dairying occurs. (Need to reference the federal regulations as to the class of creamery which is allowed.)

B. The site for a creamery is limited as follows:

1. A creamery may be co-located with a farm market or a farmer's roadside stand, either in the same building or in separate buildings or structure.

2. The area used for processing, packaging and marketing activities associated with the creamery operation, including employee and customer parking and sales, shall occupy no more than 2 acres. If a separate farm market or farmer's roadside stand is located on the same property, it shall be included within the 2 acre limit if it sells any of the creamery's product.

(Need to say that this does not include dairying operations where milk is prepared for delivery to the wholesale market, but not bottling.)

3. Setbacks. In addition to the applicable setback requirements in Section 404.4 for a farmer's roadside stand, a building being used for processing and packaging activities

must be set back in accordance with the setback requirements for a non-agricultural building in the underlying zone.

4. Parking. A creamery shall provide no more than ??? off-street parking spaces for customers. All customer parking must be constructed of a dust-free, pervious surface.

5. Signage. A creamery and an associated farm market or farmer's roadside stand must comply with BCZR Section 450, that is, the area of all permanent signs on the premise, including free-standing, wall-mounted and window signs, must be no greater than 25 square feet. No sign shall be illuminated in any manner. No temporary signs are allowed.

6. Limits on building size ?

C. Public use of a creamery is limited as follows:

1. Hours of operation. A creamery shall be open to the public no earlier than ??? A.M. and no later than ??? P.M. and a maximum of 6 days per week.

2. Other uses. The area used as a creamery shall not be used for other outdoor public activities which are not consistent with the allowed use of the underlying zone.

Definition of "Farmer's Roadside Stand"

The definition of "Farmer's Roadside Stand", as proposed, along with the present wording of 404.4.C could allow one to ship raw materials grown elsewhere into a farmer's roadside stand located in RC-6, RC-7, RC-8, RC-20, RC-50, or RCC zones, to "produce" and sell a product on site. For example, a business could ship in wood and produce furniture, which is then sold in a farmer's roadside stand in these zones.

The individual sections of the code for every RC zone currently reference Section 404.4 for the specific restrictions that apply to a farm market and farmer's roadside stand, and require that 50% of the products sold be grown on premises. However, the text of 404.4.C only addresses RC-2, RC-3, RC-4, and RC-5, implying that markets and stands in other zones do not have to comply with these requirements.

In order to avoid confusion and difficulty in enforcement, the definition of "Farmer's Roadside Stand" should include the same wording change as made for "Farm Market", to require that raw material for the production be grown on site and the specific restriction in 404.4 needs to be corrected as follows:

Section 404.4.c (of the present code) should be changed as follows:

C. A farmer's roadside stand is permitted as of right with a use permit in ~~R.C.2, R.C.3, R.C.4 and R.C.5~~ all R.C. Zones subject to the following conditions:

and, the definition of "farmer's roadside stand" (in the Staff Report) should include the same wording as being added to the definition of "farm market" as follows:

FARM MARKET -- An accessory or principal building or structure other than a dwelling which is used by one or more farmers for the sale of ~~produce~~ **products grown or grown and produced** primarily on their own farms or for the sale of other locally grown produce. A farm market may sell a limited amount of locally produced nonagricultural goods such as handcrafted items, homemade baked goods, homemade preserves, **and jams and processed dairy products.** [Bill No. 41-1992]

FARMER'S ROADSIDE STAND -- An accessory structure owned and operated by an agricultural producer, used for the sale of indigenous farm products, the majority of which

have been grown **or grown and produced primarily** on the premises, on adjacent land or on properties farmed by the same agricultural producer. [Bill No.41-1992EN]

Or a better wording for these definitions would be:

"... grown or produced primarily from materials grown or raised on their own farms ..."

"... grown or produced primarily from materials grown or raised on the premises ..."

Protection from Nuisance Complaints

The present BCZR provides agricultural operations with protection from complaints as a "nuisance" by residences in nearby RC-4, RC-7, and RC-8 zones, regardless of the zone of the agricultural operation. The proposed change to this "protection clause" adds this protection from complaints by residences in all other RC zones. Since the proposed bill does not allow creameries in RC-5, RC-6, RC-20, or RCC, the part of this change affecting those zones is outside the scope of this bill.

However, the present wording and the proposed change also have a number of unintended consequences:

1. An "agricultural" operation in a business zone could adversely impact neighboring residences, even RC-5. The term "agricultural operation" is not defined, so, for example, a store selling smelly mulch could be established in the middle of a residential area, and could cite this added clause as a defense against any complaint.
2. An "agricultural" operation in an appropriate RC zone could still be considered a "nuisance" if it adversely affects the use of a nearby business zone. For example, a restaurant built in a BL zone could file a complaint against an adjacent pre-existing farm because of smells.
3. A church or other non-residential use in an RC zone could still claim that a nearby agricultural operation is a nuisance.

This "protection clause", which is clearly needed in certain cases, should be based on the zoning of the source of the "inconvenience", not that of the affected party, and should also cover "inconveniences" to non-RC-zoned properties and to uses other than residences.

It should:

- Apply to sources in all RC zones except RC-5, RC-6, and RCC (and not to sources in business zones).
- Apply to affected properties including residential, non-residential, and businesses in all zones adjacent to any RC zone.
- Apply only to principle agricultural operations, not to ancillary activities as referred to in the definition of "Agricultural, Commercial". For example, holding loud outdoor concerts to raise money to support the agricultural operation should not automatically be "protected" from nuisance complaints.

Paragraph 3 in the proposed bill should be modified as follows:

Inconveniences arising from agricultural operations. Any dwelling, business, or use in or near to an R.C. zone may be subject to inconveniences or discomforts arising from agricultural operations at any time during the day or night. These may include noise, odors, fumes, dust, the operation of machinery (including aircraft), the storage and disposal of manure and the application by spraying or otherwise of chemical fertilizers, soil amendments, herbicides and pesticides. The County shall not consider ~~as~~ a principal agricultural operation within any RC zone other than R.C.5, R.C.6, and R.C.C. to be a public or private nuisance if the operation complies with these regulations and all

federal, state ~~or~~ and county health ~~or~~ and environmental requirements. Ancillary activities may be considered a nuisance.

(The County Code states that the Agricultural Land Preservation Advisory Board makes recommendations to PDM on zoning proposals that relate to agricultural uses. This could include a determination of what constitutes a legitimate nuisance complaint for "ancillary activities".)

Other Definitions:

"Agricultural operations", as used in the "protection clause", is not defined, and appears to be left up to the Agricultural Advisory Board to decide for each zoning violation case. Thus, it could be the subject of further zoning battles or court action. It should be defined something like:

"activities taking place in direct support of a commercial agricultural operation, not to include ancillary activities not required for the primary agricultural purpose, such as public events for fund-raising purposes."

Changes to 500.6 (Paragraph 14 of Staff Report):

The added statement implies that zoning issues related to agricultural land bypass the Zoning Commissioner and states that the "Director of PDM's decision shall be final and an appeal shall require mediation, to be paid by the appellant, prior to any court decision." This would appear to deprive one of due-process and be contrary to the actual judicial process.

The procedure for consideration by the Zoning Commission and for appeals should follow the normal process as for other zoning issues and administrative decisions made by a County official, as already defined in 404.12 and other sections with the possible added provision concerning mediation.

In any case, saying that it is "final" and then describing the process for appeal is contradictory.

The two sentences proposed in the Staff Report should not be added, but if added, should be modified as follows:

In the case of agricultural land which is under a County agricultural easement, a request for a determination ~~of~~ by the Zoning Commissioner will first be referred to the Baltimore County Agricultural Land Preservation Advisory Board for review and recommendation before consideration by the Zoning Commissioner. ~~to the Director of Permits and Development Management. The Director of Permits and Development Management's decision shall be final and~~ **An appeal shall require mediation, to be paid by the appellant, prior to any court decision consideration by the Board of Appeals.**

There should be a determination if there is any precedence for requiring mediation paid by the appellant. There are no references to "mediation" anywhere in the present BCZR. The County Code has several applicable references. It lists duties of several Advisory Boards as follows:

- Land Preservation Advisory Board: "Recommend to the Department of Environmental Protection and Resource Management procedures for mediation or arbitration of disputes regarding the value of easements being considered for purchase by the county".
- Telecommunications Advisory Panel "Endeavor to resolve disagreements among subscribers and public and private users of a cable system through nonbinding mediation".

Lacking any precedence or purpose to the contrary, the procedures for handling complaints and the rules for fees should remain as defined in 404.12 and 501.8. If changes are required, they should be made to those two sections of the BCZR, not 500.6.