

DEVELOPMENT RIGHTS AND RESPONSIBILITIES AGREEMENTS: LOCKING IN LAND USE REGULATIONS

The goals of land use planning are to provide for orderly development and at the same time to protect the health, safety and welfare of the public. Growth management policies and tools are dynamic and have been evolving to address problems and opportunities as they arise.

In the early 1990s, development projects were becoming larger and more complex, requiring capital-intensive infrastructure and longer lead time before visible construction could get under way. Development Rights and Responsibilities Agreements (DRRAs) are a tool created by the Maryland General Assembly in 1995 to address developers' concerns that local governments can change land use regulations and even a property's zoning in the midst of a long-term project, under the state's late-vesting rule.

Maryland has a strict late-vesting rule, which means that zoning and land-use rules for an approved project are not guaranteed until foundations are visible coming out of the ground. This enables local government to make adjustments in planning for adequate public facilities when a development project is stalled or just not moving forward. At the same time it can be an impediment to developers of large complex projects that require substantial investment before construction begins.

DRRAs were intended to be a "win-win" for both the developer and the local government, providing both with benefits that would not otherwise be available. For the developer, a DRRA would provide certainty that land use regulations and zoning will not change from the time the agreement is approved and for the entire term of the DRRA. For local officials, DRRAs would provide an opportunity to negotiate greater contributions for public facilities than could otherwise be required, as well as to encourage development where growth is seen as desirable.

This Fact Sheet reviews the use and impact of DRRAs in the four counties that have made the greatest use of these agreements: Anne Arundel, Charles, Frederick, and Queen Anne's. There are instances, most notably in Anne Arundel County, where a DRRA has benefitted both the developer and the county. The developer of this high-density, mixed-use DRRA project, in an area targeted by the county for transit-oriented development, is expediting construction of an essential transportation corridor that will include sidewalks, bike paths and other important amenities.

However, it appears that DRRAs have seldom been the clear "win-win" for counties envisioned at the time the legislation was enacted. Queen Anne's County's only DRRA project is a large-scale residential development on Kent Island that has been tied up in litigation for 14 years since the DRRA was approved. It will be void after 20 years. Opponents have raised concerns about adverse environmental impacts on waterways and tidal wetlands, traffic congestion, and an approval process that lacked political legitimacy.

In Frederick County, all of the DRRAs allow developers to build homes in areas where schools are at or over capacity, in exchange for paying School Construction Fees. Many are for traditional residential development rather than the large complex projects that motivated creation of the 1995 enabling legislation. Not all of the DRRAs appear to require developers to make significant contributions for public infrastructure beyond what would otherwise be expected. All of these DRRAs freeze zoning and local land-use rules for longer than the five-year default term suggested in the enabling legislation. In addition, they lock in at least one fee for the term of the agreement.

Charles County had used DRRAs for several years as a forward-funding mechanism for the State's share of school construction, enabling developers to move forward with projects that could exceed the capacity of schools in exchange for payment of various fees.

The use of DRRAs to date raises concerns that the enabling legislation gives local officials too much leeway in approving agreements that have the potential to create future budgetary and land-planning concerns. After more than two decades of experience with DRRAs in Maryland, should the state enabling legislation be reviewed and revised in order to better achieve the goals discussed when the law was enacted in 1995?

SCOPE OF THIS STUDY

The League of Women Voters of the U.S. (LWVUS) has a long history of promoting land-use policies “that manage land as a finite resource and that incorporate principles of stewardship.” The League of Women Voters of Maryland (LWVMD) has taken action to “encourage the State to establish goals, guidelines and standards for land use, with local implementation of land use policies.” This has included support for “local government’s use of land use planning and regulatory technique...to direct development to designated areas,” as well as support for statewide Smart Growth policies “intended to curb urban sprawl and protect farms and forests by directing growth into areas already served by roads and infrastructure.”

In 2015, the LWVMD voted to undertake a study of the use and impact of Development Rights and Responsibilities Agreements (DRRAs) throughout Maryland. The goal was to determine if the State League should consider a position on revising Maryland’s DRRA enabling legislation, Maryland Land Use Code Ann. §§7-301 – 307, which authorizes single-jurisdiction planning and zoning entities to adopt their own DRRA ordinances. This includes all counties and municipalities except Montgomery and Prince George’s Counties, and sets out the provisions required in local ordinances. [*Separate sections of the Maryland Code pertain to DRRAs in Montgomery County (§§24-301 - 311) and Prince George’s County (§§25-501 - 512), neither of which have used DRRAs and both of which are under the jurisdiction of the Maryland-National Capital Park and Planning Commission.*] Statewide, since 1995 eleven counties adopted DRRA ordinances. Queen Anne’s County has since repealed its DRRA ordinance, and Charles County has changed its policy on how DRRAs can be used.

The current study by LWVMD was preceded by a League of Women Voters of Frederick County (LWVFC) study on DRRAs, completed in 2014. LWVFC recommended that Frederick County government use DRRAs “strategically for high-density development projects in defined areas, to secure public infrastructure contributions from developers that are significantly greater than would otherwise be required.” *The Study Guide (page 1) provides the full text of the LWVFC position, as well as a link to information on land-use planning in Maryland (page 2).*

DEFINITIONS

Vesting is the point at which a developer’s rights cannot be taken away by local government through changes in zoning or land-use regulations. In Maryland, as defined by the courts, development rights are vested when a portion of a project is visible to the general public and can be seen as the commencement of a building—generally understood to be when foundations are visible above the ground. Prior to that point, local government can make changes that affect the developer’s ability to move forward with a project. Zoning alone does not confer any vested rights to develop a property.

A **DRRA** is an agreement between a developer and a local government that provides developers with the means to vest certain rights to develop property under the zoning and regulations in place at the time of execution of the agreement. In exchange for this early vesting, there is the expectation that the developer will provide public benefits above and beyond what would otherwise be required.

HISTORY OF MARYLAND’S DRRA LEGISLATION

“HB 700, An Act Concerning Real Property—Development Rights and Responsibilities Agreements” was enacted by the Maryland General Assembly in 1995. HB 700 grew out of an earlier effort by the development and building industry to require local jurisdictions to adopt ordinances specifying the time when a vested development right is established—in order to provide “much-needed security in property rights and real estate development,” according to a statement from NAIOP, the Commercial Real Estate Development Association. The developers sought to establish vesting earlier in the approval process for zoning or site-development. A statement from the Suburban Maryland Builders Association said the proposed law would “assist our industry in obtaining much-needed financing for projects.”

This industry position was opposed by local government officials, who argued that the current vesting policy worked well to preserve a balance between the rights of developers and of the community, and that the proposed law would limit a local jurisdiction’s ability to re-evaluate prior land use decisions for properties

where no progress had occurred. This is important to local jurisdictions in adequate public facilities planning and infrastructure allocation since otherwise, properties can receive approvals but then not be developed for years, if at all.

The industry-proposed bill did not make it out of committee; however, the House Committee on Commerce and Government Affairs convened an ad hoc workgroup to continue discussion of concerns developers had raised. This group laid the groundwork for the 1995 passage of HB 700.

HB 700 was supported by both developers and local governments and was passed by the General Assembly. The Senate Floor Report on the DRRA bill said: “Development agreements can provide benefits for both developers and local governments. For the developer, a development agreement establishes the rules and regulations which will govern the project through its construction... For the local government, a development agreement provides for greater certainty in the comprehensive planning process, as well as an opportunity to ensure the provision of necessary public facilities.” *The Study Guide (page 3) provides additional detail about the history of the DRRA legislation.*

KEY PROVISIONS OF THE DRRA ENABLING LEGISLATION

The Study Guide (page 4) provides the text of the Maryland DRRA enabling legislation. The Maryland DRRA enabling legislation gives local governments the option to enact their own DRRA ordinances. The enabling legislation also specifies --

- Powers of the local governing body to establish procedures and requirements for the consideration and execution of DRRAs.
- Required contents of local agreements, including
 - duration of the agreement;
 - permissible uses of the property;
 - density or intensity of use;
 - maximum height and size of structures;
 - description of permits required or already approved;
 - a statement that the development is consistent with the Comprehensive Plan;
 - any requirements necessary to ensure the public health, safety and welfare; and
 - to the extent applicable, provisions for dedication of a portion of the property for public use, protection of sensitive areas, preservation/restoration of historic structures, and construction or financing of public facilities.
 - Not required, but permissible, is a provision setting the time frame and terms for development and construction of the project.
- Applicable local laws, rules, regulations and policies, which will be those in force at the time the parties execute the DRRA unless the local government determines that application to the project of a local law, rule, regulation or policy enacted after the effective date of the agreement is necessary to ensure public health, safety or welfare.
- Procedures, including
 - submission of a petition by the developer and public hearings;
 - planning commission review to determine whether the proposed agreement is consistent with the comprehensive plan;
 - recordation (recording the DRRA in the land records of the local jurisdiction);
 - time limitation of 5 years unless otherwise established, or extended by amendment; and
 - terms under which the DRRA may be amended and terminated.

HOW DRRAS HAVE BEEN USED IN MARYLAND COUNTIES

Since 1995, eleven Maryland counties adopted local DRRA ordinances. Queen Anne’s County repealed its ordinance in 2004. DRRA ordinances are still on the books in Anne Arundel, Calvert, Caroline, Charles, Dorchester, Frederick, Howard, Kent, St. Mary’s, and Talbot. Nine counties (all except Caroline

and Dorchester) have considered or approved DRRAs. *The Study Guide (page 7) provides a summary of the use of DRRAs by county.*

Charles and Frederick are the only two counties that have used DRRAs for multiple developments within their jurisdictions. Anne Arundel County has approved only one DRRA for a large mixed-use project in line with Smart Growth principles. Queen Anne's County's only DRRA project is a controversial large-scale development on Kent Island; shortly after the DRRA was approved, that DRRA ordinance was repealed. Charles, which had used DRRAs to secure forward funding for schools from developers, still has a DRRA ordinance. However, in March 2016 the county decided it will no longer consider, negotiate or execute a DRRA in which school allocations are issued in exchange for a monetary payment.

Many of the DRRAs throughout Maryland have been longer than the five-year default period mentioned in the enabling legislation, ranging up to 40 years.

ANNE ARUNDEL COUNTY

One DRRA has been executed in Anne Arundel, for a large development project. Anne Arundel County government targeted the Odenton Town Center for Smart Growth development that provides mixed uses—office, residential and retail, in an urban setting with high density, sidewalks and bike trails and access to adequate transportation and transit facilities. (*Maryland's Smart Growth goals include enhancing existing communities and other locally designated growth areas; identifying and protecting valuable farmland and other natural resources; and saving taxpayers from the cost of building new infrastructure to support poorly planned development, according to the National Center for Smart Growth Research and Education.*)

The County embraced the DRRA as a critical growth management tool to expedite the development of the Town Center Boulevard near the MARC rail line. This road is on the Priority Transportation Project List for the Odenton Town Center Master Plan for immediate action.

The DRRA agreement between Halle Development and Anne Arundel County government involves only 130 acres of the approximately 1,233 acres in the Odenton Town Center Management Plan. Halle Development agreed to design, engineer and construct the Town Center Boulevard with the required sidewalks, bike paths and other amenities. The county agreed to provide sewer and water capacity through a 36" water interceptor and sewer interceptor system sufficient to support the full development of 3.5 million square feet of mixed-use development. Halle Development would receive transportation impact fee credits for the excess road capacity.

The term of the DRRA is 40 years, during which development laws will be frozen. However, the agreement provides for the project to be subject to all customary county fees, taxes and charges in effect at the time of development or build-out; these are not frozen. The county's DRRA ordinance requires an annual report to track and assess the progress and identify needs to be addressed.

To date, Anne Arundel County seems to have the most successful DRRA. The DRRA is expediting the construction of an essential transportation corridor, Town Center Boulevard. Significantly, the customary county fees, taxes and charges were not frozen and will be due at the rates in effect at the time of development. Anne Arundel County has utilized the following Smart Growth criteria that enhance the public benefits of the project: location within a growth management area for higher density and intensity of use for sustainable development *and* location within a Priority Funding Area and BRAC (Base Realignment Area) development area, which makes additional state and federal funding available for infrastructure near the MARC commuter train line.

This is a good example of a Smart Growth project using a DRRA to benefit both the public and the developer. The Halle development was considered to be an ideal project and location for use of a DRRA to secure essential infrastructure. However, county planners do not anticipate another DRRA project in the foreseeable future, due to the time required to negotiate such an agreement and the availability of other land-planning tools to manage growth. It took 2 years to negotiate the Odenton Town Center DRRA.

CHARLES COUNTY

Charles County has used DRRAs only as a forward-funding mechanism for the State's share of school construction funding, according to the county's Chief of Resource and Infrastructure Management, Department of Planning and Growth Management.

In response to a Public Information Act request, Charles County provided the LWVMD study committee with copies of agreements supporting 21 DRRAs executed during 2013 - 2015. These agreements allowed developers to exceed the capacity of schools beyond the Adequate Public Facilities Ordinance requirement if the developers paid various amounts of money, ranging from \$13,600 to \$15,500 per excess student allocation. The agreements involved a total of 970 student allocations and ranged in length from 5 years to 15 years. The average length of the 21 agreements was 6.8 years, and the most common length was 5 years, which appeared in 12 agreements.

However, Charles County is no longer approving such agreements. The Code of Charles County does not permit development that will adversely affect the adequacy of public facilities, including schools, serving the area, project or development. Additionally, the county code requires the School Capacity Allocation Committee to meet annually to establish school capacity. The county attorney's office and advice from outside counsel concluded it wasn't clear the commissioners had the authority to authorize developers to exceed school allocations by paying the county government.

After receiving this advice, the commissioners decided they would no longer consider, negotiate or execute a DRRA in which school allocations are issued in exchange for a payment. They passed a resolution incorporating that policy on March 1, 2016; held a public hearing on October 4, 2016; and subsequently codified their resolution in the Code of Charles County. None of the agreements already approved will be impacted by this policy change.

The DRRAs raise concerns about school overcrowding. Because the DRRAs extend over a number of years they have the potential to disrupt the county's annual objective school allocations process, as developers use their purchased school allocations regardless of whether a school is already overcrowded.

FREDERICK COUNTY

Between 2012 and 2014, fourteen DRRAs, for terms of 15 to 25 years, were accepted and approved for developments comprising more than 5,000 acres and allowing more than 9,800 new dwelling units. *See the Study Guide (page 8) for a list of the DRRAs approved in Frederick County.*

All of these DRRAs were enacted by a Board of County Commissioners elected in 2010, whose majority had pledged to "restore property rights" to owners of land that had been downzoned by the prior Board. The new commissioners revised the County Comprehensive Plan, approved a number of rezonings, and modified Adequate Public Facilities Ordinance (APFO) requirements for contributions from developers. *(Frederick County's APFO is intended to ensure that adequate public facilities and services—including roads, water, sewerage, and schools—are reasonably available concurrent with new development so that orderly development and growth can occur.)*

The most controversial of the changes was an APFO amendment that provided a new option in areas where schools were at capacity or overcrowded. This option, the School Construction Fee, allowed developers of residential projects to proceed in areas where schools were at or above capacity (up to 120%) by paying a fee. All 14 of the DRRAs are in areas where schools were near or at capacity. If not for the School Construction Fee, the developers would have had only two options: to construct the required public school facilities or to wait for the public school facilities to become adequate. (The School Construction Fee option has been eliminated from the APFO as of July 2016; it is not available for use by new developments going forward, although it is locked into the DRRAs).

Six of the 14 DRRAs are for developments located in Priority Funding Areas, where state funds for new or expanded infrastructure are most likely to be directed. *(Priority Funding Areas include municipalities and*

existing communities, industrial areas, and other areas local jurisdictions have planned for new residential communities which will be served by water and sewer systems and meet density standards.)

Although an analysis of public benefits provided by the DRRAs is not available, it appears that not all of the agreements require developers to contribute more support for public facilities or infrastructure than would have been required by the APFO in the regular approval process. Two (Lansdale and Monrovia Town Center) that are located in an area with serious traffic issues include above-and-beyond contributions for road improvements. All of the DRRAs freeze the building excise tax at 0. There has been opposition by citizens' groups to some of the DRRAs.

While market forces will determine whether these projects are actually built, the DRRAs raise concerns about adequacy of public facilities, particularly schools, to serve new residents the projects would generate.

QUEEN ANNE'S COUNTY

Queen Anne's County entered into its first and only DRRA in 2002 for the large-scale Four Seasons development on Kent Island. The Four Seasons DRRA

- allocated responsibilities between the developer and the county for a range of public facility improvements necessitated by the 1,350 unit residential development;
- provided for "above and beyond" cash payments to the county not related to facilities' improvements;
- pledged the county to "succinct, timely" completion of subdivision and site plan reviews under the county development laws in effect as of the date of the DRRA;
- prevented the imposition on Four Seasons of subsequently-enacted development laws unless such imposition is determined by the commissioners to be "essential to ensure the public health, safety and welfare" of residents; and
- provided that the DRRA will remain in effect as long as Four Seasons is under construction and development but in any event will be void after 20 years from its effective date.

From the beginning, there has been determined opposition to this project by many citizens' groups, environmental organizations, and elected officials. The principal grounds of opposition include:

- Four Seasons is located on Kent Island near Route 50/301 and the Bay Bridge. Opponents have asserted that the development will exacerbate the serious traffic congestion to which Kent Island is already subject on summer weekends.
- Four Seasons is a very large residential development located almost entirely in the Critical Area. *(Critical areas in Maryland include land within 1,000 feet of Maryland's tidal waters and tidal wetlands, as well as the waters of the Chesapeake and other tidal bays and tributaries.)* Opponents have asserted that Four Seasons' size and location mean that it will have exceptionally adverse environmental impacts.
- The DRRA for Four Seasons was executed by outgoing, lame-duck county commissioners after they had all been defeated in their primary elections by candidates strongly opposed to the project. Opponents have therefore attacked both the DRRA and the project itself for defying the will of the people and lacking political legitimacy.

Largely because of these factors (plus the general hostility of area residents to new residential development on a large scale), the Four Seasons project has suffered repeated legal, regulatory, and political attacks at both the county and state levels. *See the Study Guide (page 10) for a timeline of these challenges.*

As a result, 14 years after the DRRA was executed, the Four Seasons project is still in litigation and not yet under construction. Over these 14 years, the project has been reduced somewhat in size (to 1,079 units) and re-designed in certain respects (e.g., storm water management). Only Phase One of Four Seasons (consisting of 162 units on 66 acres) has been through the county approval process, and litigation remains pending even on this first phase.

In 2004, 16 months after the Four Seasons DRRA was entered into, the next group of county commissioners repealed the 1999 ordinance that authorized DRRAs in the county. Since that time, there

has been no discussion of, or advocacy for, reinstating the DRRA mechanism for development in Queen Anne's County.

ADVANTAGES AND DISADVANTAGES OF DRRAS

The effective use of DRRAs as a planning tool requires balancing and protecting the interests of both the developer and the local jurisdiction in managing growth and providing needed infrastructure. However, in their application, DRRAs have seldom been the clear win-win proposition envisioned when the enabling legislation was enacted.

Predictability. DRRAs provide certainty for developers that zoning and land-use rules will not change before vesting would otherwise occur (i.e., visible foundations). This is important for developers of large complex projects, enhancing their ability to secure financing for upfront infrastructure, such as transportation/transit facilities, water and sewer lines, and streets.

Public Benefits. The local government benefits when it negotiates agreements requiring developers to provide public infrastructure and facilities that are greater than what would otherwise be required. Such negotiations can not only provide infrastructure for the development covered by the DRRA but also spur future development in a priority area for growth—as was the case in Anne Arundel County's Odenton Town Center. In Queen Anne's County, the Four Seasons developer contributed above-and-beyond funding—although the contribution is seen by critics as a relatively small amount given the size of the project.

The language in the legislation regarding above-and-beyond public benefits is not explicit. However, the Maryland Court of Special Appeals, in an opinion filed February 3, 2017, held that a Frederick County DRRA (Blentlinger) "is void for lack of enhanced public benefits." See *Study Guide*, p. 13, for more info.

Smart Growth. DRRAs can be a valuable tool for local governments in encouraging new development in line with Smart Growth policies and in Priority Funding Areas (PFAs). The best example is the DRRA in Anne Arundel County. All Charles County DRRAs were for smaller projects. Many Frederick DRRAs were for traditional residential projects; 6 of 14 were in PFAs.

Duration and Scope. The DRRA enabling legislation specifies an initial five-year term for DRRAs unless otherwise agreed to by the county and the developer. The DRRAs in the four counties studied ranged from 5 to 40 years. While five years may not be enough time for large, complex, mixed-use developments to get to the point of foundations coming out of the ground, the enabling legislation offers the option of extending the agreement. Decade-plus DRRAs can tie the hands of future elected leaders in responding to changing needs, conditions and fiscal constraints.

DRRAs that stretch over more than a decade, with regulations—and in some cases fees—frozen or locked in can create a range of concerns. Over even a few years, the cost of constructing public facilities increases, new traffic and environmental concerns can emerge, and other conditions can change. This is exacerbated when DRRAs enable developers to move forward in locations where schools are at capacity or overcrowded, as in Frederick County and potentially in Charles County.

Modification/Termination. DRRAs can be terminated by mutual consent. Otherwise, they cannot be easily undone. A local government can only suspend or terminate a DRRA, after a public hearing, if officials can show that the change is essential to ensure the public health, safety or welfare of residents. This can be a difficult case to make and may result in costly litigation.

In summary, experience has shown that although DRRAs can be a useful land-use tool, significant concerns have been identified by this study in the application of Maryland's DRRA legislation by local governments. The consensus questions focus on whether the DRRA enabling legislation should be reviewed and adjusted and, if so, what key issues should be addressed to ensure more focused and strategic use of DRRAs going forward.

This Fact Sheet is accurate to the best of our knowledge as of 2-6-17.

CONSENSUS QUESTIONS

1. Should the MD Legislature review the DRRRA enabling legislation and consider clarifications and possible limitations?

Yes No No consensus

2. If yes, what limitations and clarifications should be discussed?

A. To explicitly state the expectation that DRRAs require developers to provide public infrastructure contributions beyond what would otherwise be required.

Yes No No consensus

B. To limit the use of DRRAs to large projects that advance needed public infrastructure.

Yes No No consensus

C. To limit DRRAs to Priority Funding Areas, in line with Smart Growth policies.

Yes No No consensus

D. To limit duration of DRRAs by making the 5-year time limit specified in the enabling legislation mandatory for all DRRAs, with the option for approval of future extensions

Yes No No consensus

E. To limit the scope of DRRAs by adding a provision that DRRAs may not freeze fees.

Yes No No consensus

F. To require that when a petition for a DRRRA is filed by a developer, the county must post a notice on the property as well as other means to alert the public at an earlier stage in the application/approval process.

Yes No No consensus

3. Should the local government be required to quantify the potential public benefits of every DRRRA prior to its approval?

Yes No No consensus

4. If the term of a DRRRA exceeds 5 years, should there be a provision to require periodic review of DRRAs and to develop a process for revision/termination of a DRRRA because of significant changes in circumstances? (This would be language broader than the current provision allowing for termination only to ensure public health, safety, or welfare.)

Yes No No consensus

5. If the current DRRRA statute is not modified to address concerns discussed in this Fact Sheet, should consideration be given to repealing the DRRRA enabling legislation?

Yes No No consensus