

Oral Testimony by Steven McKay on behalf of Residents Against Landsdale Expansion (RALE) In Opposition to the Proposed Development Rights & Responsibilities Agreement (DRRA) and Adequate Public Facilities Ordinance Letter of Understanding (APFO LOU) before the Frederick County Planning Commission, on or about 26 March 2014.

My name is Steve McKay, I live on Shakespeare Way in Monrovia, I'm the president of RALE and I am speaking before you in opposition to this draft DRRA and APFO LOU. We have a number of arguments to make and I'll start with the duration of the DRRA.

18 Year DRRA is Bad Public Policy

In November, we argued that the 25 year term of the previous version of the proposed DRRA was NOT supported by or consistent with the Applicant's documentation. We argued that the Traffic Impact Analysis indicated an estimated full build out of the development within 17 years. Further, the APFO LOU had originally been proposed for only 14 years, and is currently only 18 years. So, it is with some satisfaction to observe that the County and the developer have at least now submitted a logically consistent document. However, from the standpoint of good public policy, the 18 year term of the proposed DRRA is still too long.

Land use policy is one of the key responsibilities of the Frederick County government. A DRRA that binds the County to the terms of this agreement for even 18 years will still tie the hands of future County governments for far too long. That is 4 or 5 future County Executives and County Councils, each elected by the public, facing different policy priorities and economic realities. All will be bound by a decision made you few people, in this one point in time. In my view, that is the height of hubris in thinking that your decisions should have such lasting impact, and simply put, it is bad public policy.

Further, a DRRA for 18 years is well beyond the intent of the enabling legislation, which was 5 to 10 years. I could also point to the lack of foundation and evidence for the need for 18 years by simply looking at Urbana. That development has moved forward successfully for 35 years without benefit of a DRRA, let alone one for 18 years. Why do we need it now, what's changed?

We have heard many arguments trying to rationalize and justify these long-term DRRAs. They have been cited as "necessary" in order for a developer to obtain financing. We counter with the argument that a solid, economically-viable development proposal shouldn't need this unique and extraordinary contractual mechanism to obtain such financing. Other residential developments across the state are moving forward without long-term DRRAs – what makes Frederick County so unique?

We have heard the DRRA described as similar to a mortgage agreement. We counter with the belief that such analogies are simplistic and just wrong. I can refinance the terms of my mortgage – I can't do that with a DRRA. I can get out of a mortgage by selling my house, but I can't get out of this DRRA. Of course, we could say that the DRRA is selling out the County. Lastly, I could accept the mortgage analogy but I would put it a different way. This DRRA will mortgage our future due to the bond debt needed to pay for the infrastructure required by this development.

Issues Associated with the Age-Restricted Development

Let's begin with a question – what policy in the Comprehensive Plan is this proposal for an age-restricted community consistent with? As one of the primary features of this development, and codified in the DRRA – shouldn't we be able to point to a policy or goal within the Comprehensive Plan that supports this aspect of the agreement?

On his radio show one day, Blaine Young stated that developers propose age-restricted developments to “get their foot in the door” and then they change it to all-age. We've seen this very pattern, time and again in Frederick County, once a developer has approval for an age-restricted development it is apparently a simple matter to come back later and argue why the “economy” or “market conditions” justifies opening up the development to all-age residences. So what will preclude that from happening here? During the zoning portion of the hearing, the Chairman pointed this issue out – he asked why there weren't specific guidelines in the covenants on how or whether the community can change the age composition of the development. In response, the Applicant merely pointed out that any such change would make the development subject to the APFO school test. Is that really all we're talking about here – just paying a little more money? Is this a real proposal to build an age-restricted community, or merely a ploy to mollify an angry community and a plan to avoid paying millions of dollars in school impact and mitigation fees until later?

If this is indeed a real plan to build an age-restricted community, then the DRRA should have some teeth on this point. It should remove any possibility of this condition being changed. Further, the DRRA should require the Applicant put up bond in the amount of the foregone school contributions, just to cover the contingency of such change in the future.

Issues with the APFO LOU

In my full written testimony, I discuss a variety of problems with the TIA and LOU. We have argued and will continue to argue that Weller Road is still a problem. We acknowledge that eliminating the one access to Weller is a positive step, but Staff is still recommending connections to Weller from the public use sites. Regardless of any direct connections to the site, it is still a material omission to have completely ignored the traffic impact from this community on that marginal road. To us, and to every resident of Weller Road, this is a glaring and material omission in this application. The Applicant needs to go back to the drawing board – AGAIN – on this issue.

Much has been said about MD 75 – but it apparently hasn't been enough because you people still don't get it. As I discussed in our earlier testimony the capacity of MD 75 to handle the large increase in traffic that will still be generated by this development raises serious safety concerns. We cannot be clearer on this point – the road will not be safe.

So now the County tells us that they have made MD 75 their #1 priority for State funding. This roadway has been a top priority many times over the years and it hasn't meant a thing. The State is not going to prioritize funding MD 75 over projects like Route 15, just in order to support a development that MDP told the County wasn't needed. At the Zoning hearing last week, you asked Mr. Gugel point blank if he could estimate when the work on MD 75 could begin and he had no answer. There is no

answer. There are only guesses, and you should NOT approve this development based on guesses and an utterly ridiculous and vague reference to a “reasonable probability in the foreseeable future.”

You have heard testimony about our concerns over the potential risk from electromagnetic fields posed by the siting of the proposed high school alongside the 500kV power lines running through the property. Adoption of common sense setback requirements, first pioneered in California, and since adopted by Connecticut, Iowa and various jurisdictions across the country, will make this site unusable for a high school – and we will make that argument and fight the siting of a school on that land for as long as it takes.

In this so-called “walkable community”, the developer will not be responsible for installing traffic lights across MD 75 until the very end of the project, if at all. How will the high school students on the western side of the project cross this 4-lane State highway to get to the proposed school site? How will seniors living in the age-restricted community on the east side cross this 4-lane State highway to get to the shopping center? This so-called “walkable” community will be carved in half by a busy, dangerous 4-lane highway. In its current form, this LOU and DRRA will harm the health, safety, and welfare of the residents.

Consistency with the Comprehensive Plan

Now let’s get to the heart of the matter – your finding on whether this DRRA is consistent with the Comprehensive Plan. Article 66B of the Maryland Annotated Code, in Section 1.02 (c) states – and I’ll paraphrase just a little bit – that your finding of consistency with the comprehensive plan shall be defined to mean an action taken that will further, and not be contrary to, the following items in the plan – and the number one item on the list that follows is “policies” – the policies of the Comprehensive Plan.

Now, you have the Staff report with their recommendation. No shocker there – they recommend you find the DRRA consistent with the Comprehensive Plan. What I find amazing about that Staff report is that it didn’t include a specific reference to any policy in the Comprehensive Plan that this DRRA is supposed to be consistent with – not a single one! I took heart in the fact that on page 6, they actually made reference to the policies of the Comp Plan – previously, they only seemed to care about the maps. Of course, that reference to those un-mentioned policies was pretty vague. So I thought I would talk about a couple of those policies myself.

Specifically,

- 1) Under MG-P-13, the Comprehensive Plan states that “development staging plans that relate the pace of development to the availability of community facilities and infrastructure as part of all community and corridor plans.” This DRRA fails on school availability and you have not heard a single credible piece of information that states when the improvements on MD 75 that will be required by the build out of this development will be accomplished.
- 2) Under SC-P-02, the Comprehensive Plan states the need to “prioritize funding for those capital projects, which correct existing deficiencies.” Now stay with me here. You see, in this case, you are actually creating

the deficiency and there are no capital projects – prioritized or not – that will correct that deficiency you are creating. I call that inconsistent with that policy – how bout you?

- 3) Under SP-P-09, the Comprehensive Plan stipulates the need to “stage development of new school facilities concurrent with residential growth.” There is nothing in this document that is consistent with this policy. Writing a check does not satisfy this policy.

Now let’s ask a few questions. How will an 18 year DRRA further the policies of the Comprehensive Plan? Can anyone point to a single policy that such a long term contract is consistent with? Anyone?

Closing Remarks

In closing, I would like to reflect on your deliberations from last week – or at least, what passed for your deliberations last week. In my testimony, I pointed out a number of well-documented issues whereby both the Staff and Applicant presented one story last October and then they said everything was fine and proper, and you should approve. Then they came back months later and presented a completely different story – and said everything was fine and proper, and that you should approve. And you did – no questions asked. We have documented where County staff covered up for deficiencies in the Applicant’s proposal. And you approved it anyway. We argued that their application was in violation of a clear and unambiguous requirement in the ordinance – the contiguity issue. Staff ignored it for 18 months. Both Staff and the Applicant told you we were wrong, and you bought it. Now here we are, the PUD was drastically changed because of the contiguity issue – and you didn’t even bother to ask why. You approved it without batting an eye – at least not in public. I suppose you could have had that conversation in some quiet back room somewhere – outside of this hearing room and outside of the public eye. There seems to be a lot of those kind of discussions in Frederick County right now.

And then there’s the biggest joke of this entire proceeding – the community meeting. It is a clear and unambiguous requirement in the ordinance. Staff ignored it. The Applicant changed their story repeatedly, culminating in that whopper they told in front of the BoCC about 20-30 mystery people crammed into a tool shed. And you didn’t even bother to ask about it. You know, when I know somebody is lying to me – I don’t know, I feel compelled to call them out. I guess my ethics just don’t apply in this room. In the end, you didn’t talk about it, you didn’t ask about it – I guess you just didn’t care whether the Applicant followed the ordinance or whether the community had any input into this application.

So here we are. Your concerns about MD 75 from last November have magically been swept away through a few minor changes to the development. You can rationalize your decision however you wish, but every member of our community understands what is still wrong about this development. Every member of our community understands what it will mean for traffic safety and congestion on MD 75. Every member of our community understands that there really is no plan to address that problem. You heard from so many of those people – and you turned a blind eye and a deaf ear to them.

I believe that I've heard Mr. Young borrow a phrase from President Obama – votes have consequences. Well, your votes have consequences too. For those of you seeking political office – we'll remember your votes.

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18 Year DRRA is Bad Public Policy

In November, we argued that the 25 year term of the previous version of the proposed DRRA was NOT supported by or consistent with the Applicant's documentation. We argued that the Traffic Impact Analysis indicated an estimated full build out of the development within 17 years. Further, the APFO LOU had originally been proposed for only 14 years, and is currently only 18 years. So, it is with some satisfaction to observe that the County and the developer have at least now submitted a logically consistent document. However, from the standpoint of good public policy, the 18 year term of the proposed DRRA is still too long.

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Issues with the Traffic Impact Analysis

- 1. Failure to Include the Proposed High School.** The traffic impact of the proposed high school site was not factored into the TIA. I imagine the reason is that the Applicant views that analysis as the County's or the Board of Education's responsibility. Unfortunately, after we spoke on this matter with several people connected with the Board of Education, it became apparent that such an analysis is very unlikely to happen. The BOE expects the developer causing the need for the school site to assess the traffic impact. With both sides pointing at the other, our expectation is that NO traffic analysis will be performed, NO effective mitigation measures will be taken, and the residents of Monrovia will be left with the mess. With the prospect of two schools – Green Valley Elementary and the mythical high school – on opposite sides of the same intersection, the traffic impact on the Community will be severe, to say the least. One only needs to look at the long grid-locked traffic on MD 80 through Urbana in the morning and afternoon, to understand what MD 80 in Monrovia will look like from these school sites to MD 75 to the west, and to the Green Valley shopping center to the east. The time to assess and mitigate these issues is now.

2. **Failure to Assess the Impact on Weller Road.** As discussed in our earlier testimony, the TIA failed to include any analysis for Weller Road. We acknowledge that eliminating the one access to Weller is a positive step, but Staff is still recommending connections to Weller from the public use sites. Regardless of any direct connections to the site, it is still a material omission to have completely ignored the traffic impact from this community on that marginal road. Weller Road is a small, cramped road that connects across MD 75, Lynn Burke, and Bartholows. It's unlined most of the way because it isn't too wide, barely enough for two cars to get by each other. What new residents to that community will quickly learn is that when you want to get from Monrovia Town Center to Mt. Airy, taking Weller Rd to Lynn Burke is going to be the fastest & most direct path. And that's a big problem. The road isn't suited for a major development to use it for any purpose whatsoever. It wasn't included in the TIA, and there is not one mitigation measure planned. To us, and to every resident of Weller Road, this is a glaring and material omission in this application. The Applicant needs to go back to the drawing board – AGAIN – on this issue.
3. **Failure to Include the Hindu SBA Temple.** In the TIA, three churches are identified as approved background traffic source – Evangelical Lutheran Church, Hebron Christian Church, and Pleasant Grove Church. On October 10, 2012, the Planning Commission approved the Hindu SBA Temple, to be located south of the intersection of MD 80 and Ed McClain Rd. Clearly, this development will have a significant traffic impact on the roads surrounding the proposed development and yet it was missing from the TIA. The church is envisioned to serve the entire Hindu community across the Maryland, Virginia, and DC region – and yet, the TIA did not factor it in. I imagine the answer is that the Planning Commission allowed the Hindu SBA Temple to be approved using a previously produced TIA for the previously-proposed Evangelical Lutheran Church. That was an error then, and it is an error now. The two site concepts are significantly different and warrant independent traffic impact studies. The failure to do so then, is now being compounded as those unjustified traffic estimates are now being used in successive traffic studies by newer developments, including the proposed one. When data has not been collected to support the actual approved site use, then the measures specified to mitigate the deficiencies identified by the invalid data, are equally invalid. This error should not continue to be propagated forward with each new development proposal. The TIA should be redone to reflect an accurate picture of the approved developments surrounding the Applicant's proposal.
4. **Background Traffic Growth is Under-Estimated.** On page 41 of the TIA, the County directed the applicant to assume a 3% background traffic growth rate for MD 75 and 2% for MD 80. This is consistent with the State's recommendation to use 2-3% growth rates. On page 2 of the TIA, however, the Applicant's contractor stated that they used only a 1% growth rate. This contravenes the County's reported guidance, as well as the State's recommended guidance. As

such, it under represents traffic volumes, leading to smaller than required mitigation measures, and an inadequate APFO LOU.

The APFO LOU Represents Inadequate Public Facilities – and as such is not consistent with the Comprehensive Plan or current zoning ordinance

1. Failure to Provide Real Plans & Contribution Toward MD 75 Project.

Mister Chairman, back on January 16th, you said “...until we can fix the situation on Route 75 going north it’s going to exasperate an already pretty bad problem.” I couldn’t agree with you more. As I discussed in our earlier testimony the capacity of MD 75 to handle the large increase in traffic that will be generated by this development raises serious safety concerns. We cannot be clearer on this point – the road will not be safe. Between the long, hilly, winding portion south of MD 80 with its many blind curves and hidden driveways, to the tortuous path before the railroad overpass north toward I 70, the road is not designed for such a large influx of vehicle traffic.

The County agrees with this assessment. We need only examine their pronouncements in the Annual Transportation Priorities Review and the Highway Needs Inventory. The County has specifically correlated the need to improve the roadway because of the developments being built here. The County needs \$262,000,000 to reconstruct and realign the road with unknown more millions to expand it into a 4-lane highway. Clearly, the roadway is not adequate to support this development.

After decades of being unable to obtain State funding to fix the roadway, the County now appears to be embarking on the risky strategy of (1) promoting development, (2) having developers contribute toward a “public-private” fund, and (3) seeing what happens next. Personally, we view this public-private partnership as a big game of chicken. The County will allow the development, collect a fraction of the needed funds, create a far more treacherous situation on the road – and then dare the State not to fix it.

All you have to do is look at how much is being collected in the MD 75 fund. Under the revised plan, this Applicant will contribute **\$5,752,691** toward the MD 75 fund. Landsdale contributed a little over \$3,000,000 toward unspecified regional road improvements, a portion of which we can assume will go toward MD 75. The Oakdale-Linganore PUD – the largest development in this part of the County is only contributing about \$1,000,000. So that’s no more than **\$9,752.691 or 3.7% of the funds needed** just for the realignment/reconstruction project. Where will the remaining funds come from? How much more development will be needed to make a more meaningful contribution to the fund? How much more dangerous will the road become before those goals are met? We don’t know and neither does the County.

So now the County tells us that they have made MD 75 their #1 priority for State funding. This roadway has been a top priority many times over the years and it hasn’t meant a thing. The State is not going to prioritize funding MD 75 over projects like Route 15, just in order to support a development that MDP told the County wasn’t needed. At the Zoning hearing last week, you asked Mr. Gugel

point blank if he could estimate when the work on MD 75 could begin and he had no answer. There is no answer. There are only guesses, and you should NOT approve this development based on guesses.

Now the question is whether this DRRA, which will lock in this utter mess on MD 75, is consistent with the Comp Plan. The Staff thinks so. On page 6 of their report, they say it “provides for the timing of development and infrastructure improvements ... consistent with the policies of the Comprehensive Plan.” How can that be? How can this document, which will codify decades of growth on an unsafe road requiring hundreds of millions to fix, money that isn’t in anyone’s budget, be consistent with the Comp Plan? This situation is in direct conflict with the intensity of development suited for this roadway, and says nothing to the timing of development of the roadway needed to fix the problems.

It is a basic part of your charter to ensure the health, safety, and welfare of the public. The hours of testimony that you’ve heard, plus your own statement, Mr. Chairman, tell us all that your concurrence on this DRRA will fundamentally violate your charter.

2. **The Proffered High School Site is Unsafe for Our Children.** You have heard testimony about our concerns over the potential risk from electromagnetic fields posed by the siting of the proposed high school alongside the 500kV power lines running through the property. Adoption of common sense setback requirements, first pioneered in California, and since adopted by Connecticut, Iowa and various jurisdictions across the country, will make this site unusable for a high school – and we will make that argument and fight the siting of a school on that land for as long as it takes.
3. **Inconsistent Documentation on Party Responsible for Acquiring Right of Way for Relocated MD 75.** The relocation of MD 75 south of MD 80, across the farmland to a point ½ mile along the current MD 75, is the critical mitigation measure for dealing with the traffic failures at the two MD 75/80 intersections. All aspects of this requirement should be clearly stipulated, planned, and funded. The DRRA and APFO LOU need to get this right. This is why it is very disconcerting that a basic issue – the party responsible for acquiring the right of way – is written ambiguously in the document. Specifically, on page 5 of the LOU, it states very clearly that “the County is responsible for right-of-way acquisition and its associated costs...” On the very next page, however, in Section B.1., we find the following:

“In the event that some of the public infrastructure improvements, including items A.1 [MD 75 Relocated] ..., required by this LOU to be made by Developer will require acquisition of public right-of-way from third party property owners, Developer shall exercise commercially reasonable efforts to secure such right-of-way without the assistance of the County.”

There can be no ambiguity on this point, and currently, the LOU is not only ambiguous but the text is in direct conflict with itself on two adjoining pages.

4. **Failure to Identify Alternative Mitigation if MD 75 Relocation Right-of-Way Not Acquired.** As noted above, the relocation of MD 75 south of MD 80 is a critical mitigation measure. In its letter of September 18, 2013, the SHA acknowledged that this is the acceptable mitigation for the east and west intersections of MD 80 and MD 75. The APFO LOU, however, allows for the scenario in which the Applicant fails to acquire the right-of-way. In that scenario, the Applicant will then pay a fee in-lieu of actually constructing the MD 75 relocation. What then? In that scenario, there will be no acceptable mitigation defined for the traffic study failures at the two intersections of MD 75 and MD 80. There is no defined plan for alternative mitigation measures. Considering that the DRRA and APFO LOU are proposed to span 18 years, these scenarios should be defined, studied, and properly mitigated – and then codified in these documents. Failure to do so represents a material deficiency in the documents and you should not conclude with a positive finding until this issue is resolved.
5. **Failure to Justify Extension of APFO LOU from 14 to 18 Years.** Section 1-20-8(D)(1) of the ordinance limits the duration of APFO approval for a development of this size to 14 years. In fact, in their earlier draft of the APFO LOU submitted in August, the Applicant held to this limit. In the current proposed LOU, however, the Applicant has requested a duration of 18 years. Section 1-20-8(D)(4) allows for such a longer duration, however it stipulates a requirement for the Developer to justify the extended duration. We see no justification for extending the duration of the APFO LOU in any of the documents made available tonight. Before this LOU is approved, the Developer should provide such justification for public review.
6. **Required Road Improvements are Poorly Defined.** Under sections A.4, A.5, and A.6, the requirement for signal warrant analysis is undefined. Stating merely that the analysis is done “no later than the issuance of the last building permit” is vague and inconclusive. If the developer never completes the planned 1,250 units, when will anyone know when the “last” permit is? How long will we wait to get that answer, and will it happen prior to the expiration of this LOU.
7. **How Will Students and the Elderly cross MD 75 Without Any Traffic Signals?** In this so-called “walkable community”, the developer will not be responsible for installing traffic lights across MD 75 until the very end of the project, if at all. How will the high school students on the western side of the project cross this 4-lane State highway to get to the proposed school site? How will seniors living in the age-restricted community on the east side cross this 4-lane State highway to get to the shopping center? This so-called “walkable” community will be carved in half by a busy, dangerous 4-lane highway. In its current form, this LOU and DRRA will harm the health, safety, and welfare of the residents.

Consistency with the Comprehensive Plan

Now let's get to the heart of the matter – your finding on whether this DRRA is consistent with the Comprehensive Plan. Article 66B of the Maryland Annotated Code, in Section 1.02 (c) states – and I'll paraphrase just a little bit – that your finding of consistency with the comprehensive plan shall be defined to mean an action taken that will further, and not be contrary to, the following items in the plan – and the number one item on the list that follows is “policies” – the policies of the Comprehensive Plan.

Now, you have the Staff report with their recommendation. No shocker there – they recommend you find the DRRA consistent with the Comprehensive Plan. What I find amazing about that Staff report is that it didn't include a specific reference to any policy in the Comprehensive Plan that this DRRA is supposed to be consistent with – not a single one! I took heart in the fact that on page 6, they actually made reference to the policies of the Comp Plan – previously, they only seemed to care about the maps. Of course, that reference to those un-mentioned policies was pretty vague. So I thought I would talk about a couple of those policies myself.

Specifically,

- 4) Under MG-P-13, the Comprehensive Plan states that “development staging plans that relate the pace of development to the availability of community facilities and infrastructure as part of all community and corridor plans.” This DRRA fails on school availability and you have not heard a single credible piece of information that states when the improvements on MD 75 that will be required by the build out of this development will be accomplished.
- 5) Under SC-P-02, the Comprehensive Plan states the need to “prioritize funding for those capital projects, which correct existing deficiencies.” Now stay with me here. You see, in this case, you are actually creating the deficiency and there are no capital projects – prioritized or not – that will correct that deficiency you are creating. I call that inconsistent with that policy – how bout you?
- 6) Under SP-P-09, the Comprehensive Plan stipulates the need to “stage development of new school facilities concurrent with residential growth.” There is nothing in this document that is consistent with this policy. Writing a check does not satisfy this policy.

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Closing Remarks

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So here we are. Your concerns about MD 75 from last November have magically been swept away through a few minor changes to the development. You can rationalize your decision however you wish, but every member of our community understands what is still wrong about this development. Every member of our community understands what it will mean for traffic safety and congestion on MD 75. Every member of our community understands that there really is no plan to address that problem. You heard from so many of those people – and you turned a blind eye and a deaf ear to them.

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