

25 February 2018

Dear County Council Members, the County Executive, and the County Attorney

I'm writing to you in concern about the way the current amendment before the County Council will impact the governance of existing DRRAs. As proposed in amended Bill 17-18, the Council would remove entirely Chapter 1-25 (DRRA code) from County law. In it's place, is proposed a "grand-fathering" clause that reads as follows:

§ 1-25-1. Transitional Provisions.

(A) Any Development Rights and Responsibilities Agreements in effect as of February 1, 2018 shall remain in full force and effect, and such agreement, or amendments thereto, shall be governed by the terms of the agreement.

My concern is based on the language in this clause which defines the processes & requirements for any future amendments to existing DRRAs solely on the terms of each contract. I surveyed several contracts and find that (1) they differ materially on the amendment issue and (2) they do not all address the amendment requirements currently found within either Chapter 1-25 or State law. Further, each document points back to "applicable laws" which will no longer exist at the County level if amended Bill 17-18.

I think this creates an ambiguous and legally untenable situation with respect to the amendments issue. I would suggest that there may be additional issues if each DRRA were to be fully analyzed in the context of this amended bill. I am also concerned about the appellate rights and procedures for future amendments. More basically, I am also concerned whether there may be unintended consequences that could alleviate responsibilities under the terms of current DRRAs, based on amended Bill 17-18. **If it is the goal of the County Council to eliminate the ability to create new DRRAs, then I can support that goal. However, I respectfully suggest that a different approach be taken, one that does not include deleting current County law governing the fourteen (14) existing agreements.**

Procedural Requirements for Amending a DRRA

Under the current Chapter 1-25, the following language details the requirements and processes for amending an existing DRRA:

§ 1-25-7. AMENDMENT OF AGREEMENT.

(A) Subject to paragraph (B) of this section and after a public hearing, the parties to an agreement may amend the agreement by mutual consent.

(B) The parties may not amend an agreement unless:

(1) The Planning Commission determines whether the proposed amendment is consistent with the Comprehensive Plan and

(2) After a public hearing, the County Council adopts a resolution authorizing the amendment.

There are three key requirements to amend a DRRA: (1) it is by mutual consent, (2) the Planning Commission finds the amendment consistent with the Comprehensive Plan (which could occur following a public hearing), and (3) the County Council adopts a resolution approving the amendment (which would also follow a public hearing). I want to highlight the Planning Commission role in this process because as you'll see, it is this requirement that may be most harmed by amended Bill 17-18.

Survey of Amendments Clauses in Current DRRAs

To assess the significance of this issue, I surveyed the current DRRAs governing the Jefferson Technology Park, Landsdale, Blentlinger, and Casey developments. I've extracted the relevant clause from each document, which are shown below:

JTP DRRA

9.4 Amendments.

A. The parties to this Agreement may amend the Agreement by mutual consent after the BOCC holds a public hearing and complies with all applicable laws concerning amendment of a Development Rights and Responsibilities Agreement. All amendments to this Agreement shall be in writing and shall be executed by the BOCC and the Developer.

B. This Agreement may be amended in accordance with the applicable provisions of Chapter 1-25 of the Frederick County Code to incorporate subsequent Development Approvals and requirements for Phases of the Project.

Landsdale DRRA

12.1.3 Amendments. The parties to this Agreement may terminate the Agreement by mutual consent after the BOCC hold a public hearing and comply with all applicable laws concerning amendment of a Developer Rights and Responsibilities Agreement. All amendments to this Agreement shall be in writing and shall be executed by the BOCC and the Developer. Unless the Planning Commission determines that the proposed Agreement is consistent with the County Comprehensive Plan, the parties may not amend or terminate this Agreement and the BOCC may not suspend or terminate the Agreement.

Blentlinger DRRA

9.5 Amendments.

A. The parties to this Agreement may amend this Agreement by mutual consent after the BOCC holds a public hearing and complies with all applicable laws concerning amendment of a Development Rights and Responsibilities Agreement. All amendments to this Agreement shall be in writing and shall be executed by the BOCC and the Developer.

B. This Agreement may be amended in accordance with the applicable provisions of Chapter 1-25 of the Frederick County Code to incorporate subsequent Development Approvals and requirements for Phases of the Project.

Casey DRRA

9.5 *Amendments.* The parties to this Agreement may amend the Agreement by mutual consent after the BOCC holds a public hearing and complies with all applicable laws concerning amendment of a DRRA. All amendments to this Agreement shall be in writing and shall be executed by the BOCC and the Charitable Foundation.

As you can see above, across these four DRRAs, there are three very different descriptions on how an amendment process would proceed. This is particularly significant since each document attempts to reference back to “applicable laws” which will no longer exist under amended Bill 17-18. Where we currently have a uniform law and process governing each DRRA amendment process, amended Bill 17-18 would create a situation where the process and requirements would vary for each agreement.

More significantly, only the Landsdale DRRA properly recognizes the State-mandated role of the Planning Commission to make a finding of consistency with the Comprehensive Plan for any proposed DRRA amendment. The other three contracts are silent on this issue. Given that this requirement comes from State law, the County would find itself acting contrary to State law if it followed the amendment process referenced only in the individual contracts.

To summarize, amended Bill 17-18 stipulates that the terms of the agreement would govern amendments. For at least three agreements, these terms are not consistent with State Law. Thus, amended Bill 17-18 is not consistent with State Law. So far, this argument only pertains to the amendment process. I wonder what other issues would be unearthed given a detailed analysis of each DRRA. How many of these documents rely upon existing County law for issues that may arise in the future, law that won't be there any more under amended Bill 17-18.

Summary

To reiterate my earlier statement, if the County Council wishes to remove the ability to write new DRRAs, then I can support that goal. However, I think the method chosen under amended Bill 17-18 is the wrong path. It will lead toward potentially unintended consequences. I have highlighted the amendments issue. I think this is a significant concern. It is one of the primary issues likely to face the County with the existing DRRAs. As written, amended Bill 17-18 will create an ambiguous and legally untenable position on how the County amends these agreements. Following only the terms of certain of these agreements, the County could find itself in violation of State Law on the proscribed role of the Planning Commission. Given your current consideration of amended Bill 17-21 (permitted uses in MXDs), I think this is a very real possibility. I urge you to reconsider your approach to this Bill 17-18, and to find a new method for eliminating future DRRAs, one that doesn't harm the County's ability to properly govern the existing agreements.

Respectfully,



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