TITLE: Hogan Property DRRA

FILE NUMBER: DRRA 14-07

REQUEST: Finding of Consistency
Review of the Development Rights and Responsibilities Agreement (DRRA) for the Hogan Property to make a finding if the proposed agreement is consistent with the County Comprehensive Plan.

PROJECT INFORMATION:
LOCATION: West side of New Design Rd.
ZONING: R-16 High Density Residential
REGION: Frederick
WATER/SEWER: S-1/W-1
COMP. PLAN/LAND USE: High Density Residential

APPLICANT/REPRESENTATIVES:
APPLICANT: Lawrence and Ilona Hogan
OWNER: 
ENGINEER: 
ATTORNEY: Noel Manalo, Miles & Stockbridge

STAFF: Jim Gugel, Planning Director

RECOMMENDATION: Staff recommends that the Frederick County Planning Commission find that the location, character, and extent of the proposed Development Rights and Responsibilities Agreement for the Woodbourne Manor are consistent with the County Comprehensive Plan.

ATTACHMENTS:
1. Draft Development Rights and Responsibilities Agreement
STAFF REPORT

ISSUE
The Planning Commission role in the review of the Development Rights and Responsibilities Agreement (DRRA) for the Hogan Property is to determine whether the proposed DRRA is consistent with the County Comprehensive Plan.

BACKGROUND
The petition was submitted on July 3, 2014 and includes the draft DRRA and exhibits. Staff has reviewed the material and has determined that all of the required submittal material has been received in accordance with § 1-25-03 and §1-25-04 of the Frederick County Code, including the required contents of the DRRA.

This DRRA does not involve a concurrent rezoning request nor does it include an APFO component.

Figure 1 shows the Hogan Property (9.5 acres) that would be subject to the DRRA.

The property is currently zoned R-16 High Density Residential and is designated High Density Residential on the Comprehensive Plan. It is located in the Ballenger Creek community growth area. The property was rezoned to R-16 in 1989 and recently received approval (effective July 24, 2014) to amend the zoning conditions from the original rezoning in 1989. The property is currently developed with the Hogan family residence. The property does not have any current development approvals nor does it have any active plans under review.

SUMMARY OF DRAFT DRRA
The Development Rights and Responsibilities Agreement (DRRA) review and approval procedures are found in Chapter 1-25 of the County Code. The two primary components of any DRRA are the development rights and the development responsibilities that will be fixed for the project for a specified time period.

This DRRA is not being reviewed with a rezoning or an APFO component.

The Applicant is proposing that the DRRA be in effect for a period of 25 years. Described below is a summary of the rights and the responsibilities applicable to this development. The attached draft DRRA and accompanying exhibits include the specific development approvals and conditions of approval.

Development Rights
- Maintain the R-16 High Density Residential zoning with a maximum of 144 dwellings and the High Density Residential land use plan designation.
- Maintain or obtain other approvals based on current regulations or, if applicable, the regulations in effect when the approvals were granted.
- Maintain current County development regulations that govern use, density, and intensity of the property, for the term of the DRRA.
- Maintain the terms of the DRRA for a period of 25 years.

Development Responsibilities
As this property already has water/sewer infrastructure to the property and New Design Road is constructed to its ultimate design there are no facility or infrastructure improvements being proffered as part of this DRRA. The property will be subject to the Adequate Public Facilities Ordinance (APFO) review as part of any subsequent site plan/ preliminary subdivision plan submission.
FINDING OF CONSISTENCY REVIEW

State Code and Guidelines
The Land Use Article of the Annotated Code of Maryland provides general requirements with regards to a finding of consistency with a comprehensive plan. Section 1-303 Consistency – General requirement of the Land Use Article further defines consistency with a comprehensive plan to mean “an action taken that will further, and not be contrary to the following items in the plan:

1) Policies:
2) Timing of the implementation of the plan;
3) Timing of development;
4) Timing of rezoning;
5) Development patterns;
6) Land uses; and
7) Densities or intensities

The Maryland Department of Planning in its Models and Guidelines document titled: ‘Achieving Consistency under the Planning Act’ also provides guidance on determining consistency with a comprehensive plan. It states:

“...land use regulations and decisions should agree with, and implement what the Plan recommends and advocates. A consistent regulation or decision may show clear support for the Plan. It may also be neutral – but it should never undermine the Plan.”

Findings of Consistency with the Comprehensive Plan

- The Hogan Property is designated High Density Residential on the County Comprehensive Plan and is located within the Ballenger Creek community growth area.
- The project provides an appropriate level of infill development that is compatible with adjoining development in the Ballenger Creek community.
- The existing R-16 zoning on the property is consistent with the High Density Residential (12-20 dwellings/acre) land use plan designation.

STAFF RECOMMENDATION
Staff recommends that the Frederick County Planning Commission find:
That the location, character, and extent of the proposed Development Rights and Responsibilities Agreement for the Hogan Property is consistent with the Frederick County Comprehensive Plan.

PLANNING COMMISSION ACTION

MOTION TO FIND CONSISTENT
I move to find that the that the location, character, and extent of the proposed Development Rights and Responsibilities Agreement (DRRA 14-07) for the Hogan Property is consistent with the Frederick County Comprehensive Plan.

MOTION TO FIND INCONSISTENT
I move to find that the that the location, character, and extent of the proposed Development Rights and Responsibilities Agreement (DRRA 14-07) for the Hogan Property is inconsistent with the Frederick County Comprehensive Plan.
DEVELOPMENT RIGHTS AND RESPONSIBILITIES AGREEMENT

THIS DEVELOPMENT RIGHTS AND RESPONSIBILITIES AGREEMENT ("Agreement"), made as of the _____ day of _________________, 2014, by and between LAWRENCE J. HOGAN and ILONA M. HOGAN, of Frederick County, Maryland (collectively, the “Developer”); and THE BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND, a body politic and corporate of the State of Maryland (the “BOCC”).

RECITALS

1. Maryland law, Land Use Article §7-301 through §7-306 (formerly Article 66B, § 13.01) of the Maryland Annotated Code, grants the BOCC the authority to establish procedures and requirements for the consideration and execution of Development Rights and Responsibilities Agreements.

2. The BOCC has adopted Ordinance No. 07-33-473, effective as of November 16, 2007, creating Chapter 1-25 of the Frederick County Code authorizing Development Rights and Responsibilities Agreements (“County Ordinance”).

3. This document is intended to constitute a Development Rights and Responsibilities Agreement as provided for in Land Use Article §7-301 through §7-306 of the Maryland Annotated Code, and the County Ordinance.

4. Developer owns and/or has legal or equitable interest in certain real property in Frederick County, Maryland, described in EXHIBIT 3, attached hereto and made part hereof (the “Property”).

5. The names of all parties having an equitable or legal interest in the Property, including lienholders, are set forth in EXHIBIT 1. Attached hereto and made a part hereof as EXHIBIT 2 is certification by counsel to the Developer that the Developer has either a legal or equitable interest in the Property.

6. On July 3, 2014, Developer petitioned the BOCC to enter into this Agreement.

7. During a public meeting held on July 24, 2014, the BOCC reviewed this petition and determined to accept this petition and initiate the process of considering a Development Rights and Responsibilities Agreement.

8. This Agreement was referred to the Frederick County Planning Commission for determination of whether this Agreement is consistent with the Countywide Comprehensive Plan for Frederick County. This determination was made by the Planning Commission at a public meeting held on _______, 2014.
9. On ______, 2014, the BOCC held a duly advertised public hearing on this Agreement. The public had an opportunity to comment at this public hearing.

10. The Developer intends to pursue the Development Approvals (defined below) necessary to develop the Property in accordance with the Rezoning Ordinance (defined below) approved by the BOCC. This DRRA is expressly intended to contractually bind the Developer and the County as to the development of the Property in accordance with the terms hereof. This DRRA is intended to protect, preserve and facilitate the full development of the Project (defined below) pursuant to the Development Approvals and this DRRA, including, but not limited to, residential uses and densities as set forth herein and in the Rezoning Ordinance.

NOW, THEREFORE, in consideration of the foregoing recitals, which are not merely prefatory but are hereby incorporated into and made a part of this Agreement, and the mutual covenants and agreements set forth below, and other good and valuable consideration, the receipt and sufficiency of which the parties hereby acknowledge, the BOCC and the Developer hereby agree as follows:

**ARTICLE I
DEFINITIONS**

1.1 **Definitions.** The following words, when used in this Agreement, shall have the following meanings:

A. “Agreement” means this Development Rights and Responsibilities Agreement.

B. “BOCC” means the Board of County Commissioners of Frederick County, Maryland, a body corporate and politic, also sometimes referred to as “County Commissioners.”

C. “Comprehensive Plan” means the Frederick County Comprehensive Plan as amended on September 13, 2012.

D. “County Code” means the Code of Frederick County, Maryland in effect on the Effective Date of this Agreement.

E. “County Ordinance” means County Ordinance No. 07-33-473 creating Chapter 1-25 of the Frederick County Code and authorizing Development Rights and Responsibilities Agreements.

F. “Developer” means Lawrence J. Hogan and Ilona M. Hogan, and their successors and assigns in ownership of the Property.

G. “Development Approvals” means final governmental approval of Subdivision Plat(s), Adequate Public Facilities Ordinance (“APFO”) requirements, all Preliminary Plans and Site Plans for the Project, County Water and Sewerage Plan
amendments, the Rezoning Ordinance, and all conditions of said approvals that have been satisfied, or acceptable accommodations and/or guarantees have been put in place to satisfy such conditions, and all applicable appeal periods have expired without the filing of any appeal, or, if an appeal(s) was filed, the appeal has been defeated beyond the possibility or existence of further appeal of any kind.

H. “Effective Date of this Agreement” means the date on which the last party executes this Agreement.

I. “Improvements” or “improvements” means those improvements referenced herein to be constructed in connection with roads, sewer, water, stormwater, parks and other facilities necessary to service the Property.

J. “Phase” means any portion or section of the Project which has received Development Approval.

K. “Planning Commission” means the Planning Commission for Frederick County Maryland.

L. “Project” means the 5614 New Design Road project to be constructed on the Property.

M. “Property” means all of the real property described in EXHIBIT 3 attached hereto.

N. “Rezoning Ordinance” means Ordinance No. 14-11-666, amending the conditions of Ordinance No. 89-39-570, applicable to the Property.

O. “Subdivision Plat” means a final plat(s) of subdivision for the Project, or any Phase or portion thereof, prepared in accordance with the County Code and approved by the Planning Commission.

ARTICLE II
ZONING, DEVELOPMENT LIMITATIONS, PLAN APPROVALS AND PLAN CONSISTENCY

2.1 Zoning and Plan Designations. The Property is zoned R16 – High Density Residential. The Property is: located within the Community Growth Limit of the Ballenger Creek Community Growth Area as shown on the County Comprehensive Plan; designated High Density Residential on the Comprehensive Plan; and classified W-1/S-1 on the current Frederick County Water and Sewerage Plan.

2.2 Development Limitations.

A. Permissible Uses and Density. The permissible uses on the Property are those permitted in the County Code. The Project shall be developed as an R16 – High
Density Residential project. The Project will contain a mix of housing types. A maximum of 144 residential dwelling units are permitted in the Project pursuant to the Rezoning Ordinance.

B. Development Requirements. The Property shall be developed in accordance with, and subject to, the conditions and requirements of the Development Approvals that are required pursuant to County Code and the terms and conditions of this Agreement. Setbacks, building size and other development standards shall be as approved by the Planning Commission in accordance with the Development Approvals and applicable sections of the County Code. The maximum height for residential structures in the Project shall be 100 feet; No individual building on the Property shall exceed 170,000 square feet of gross floor area.

C. Revision of Use Mix. Developer shall have the ability to revise the mix of residential unit types in the Project (subject to the cap of 144 residential dwelling units established in the Rezoning Ordinance) provided that such revision complies with all applicable Development Laws. Developer shall be permitted to stage the timing of development of the various uses in the Project in response to market demand.

D. Historic Structures. The Property area is not listed formally in the National Register of Historic Places or the Frederick County Register of Historic Properties.

2.3 Other Development Approvals and Permits. The Project shall be required to comply with all other applicable requirements of the County Code for land development, including, but not limited to, site improvement plans (for water, sanitary sewer, and storm drainage and sediment, and erosion control improvements), water and sewer amendments, compliance with the County Forest Resource Ordinance, Subdivision Plats, building permits, and occupancy permits. The Project shall also be required to obtain all applicable State or federal approvals and permits.

2.4 Moderately Priced Dwelling Units. In accordance with the provisions of Section 1-6A-5.1(G) of the County Code regarding moderately priced dwelling units (“MDPUs”), Developer hereby elects to utilize, and the BOCC agrees to permit Developer to utilize, the Payment in Lieu of Building MPDUs as provided in Section 1-6A-5.1 aforesaid, as in existence as of the date hereof, in lieu of the requirement to build MPDUs. A draft Moderately Priced Dwelling Unit Payment In Lieu Agreement is attached hereto and made part hereof as EXHIBIT 5.

ARTICLE III
COMMUNITY FACILITIES AND INFRASTRUCTURE IMPROVEMENTS

3.1 Road Improvements; Excise Tax. In satisfaction of APFO requirements for the Project, Developer may be required to either construct or fund the construction of certain road improvements or contribute to an escrow fund for road improvements, all as will be comprehensively set forth in the APFO Letter of Understanding in accordance with the
Development Laws ("APFO LOU") at the appropriate time. Currently, the building excise tax provided for in Section 2-7-131 of the Public Local Laws of Frederick County and in Section 1-8-73 of the County Code is established at $0 by Ordinance No. 11-23-589. In recognition of the anticipated overall package of road improvements to be funded by the Developer, the excise tax shall be zero dollars ($0) for the term of this Agreement.

3.2. **Sewer Improvements.** Public Sewer shall be extended to the Property as will be provided for in the APFO LOU. As to sewer improvements required of the Developer, if any, the improvements may be constructed by Developer through a PIA between Developer and the County, in accordance with the Development Laws. The BOCC shall process any applications filed by the Developer to amend the County Water and Sewerage Plan in a timely manner. The Developer will pay tap (capacity) fees in accordance with the current fee schedule in effect at the time of building permit application, and the County shall issue such tap approvals in the normal course as a ministerial function. The Developer may request sewer capacity fee credits pertaining to the provision of public sewer to the Property if the applicable requirements of the Frederick County, Maryland Water and Sewer Rules and Regulations are satisfied.

3.3 **Water Improvements.** Public water shall be extended to the Property as will be provided for in the APFO LOU. As to water infrastructure improvements required to be made by Developer, if any, the improvements may be constructed by the Developer through a PIA between Developer and the County, in accordance with the Development Laws. The BOCC shall process any applications filed by the Developer to amend the County Water and Sewerage Plan in a timely manner. The Developer will pay tap (capacity) fees in accordance with the current fee schedule in effect at the time of building permit application, and the County shall issue such tap approvals in the normal course as a ministerial function. The Developer may request water capacity fee credits pertaining to the provision of public water to the Property if the applicable requirements of the Frederick County, Maryland Water and Sewer Rules and Regulations are satisfied.

3.4 **Schools.**

A. **School Construction Fee.** The School Construction Fee was established by Ordinance No. 11-18-584, enacted on July 20, 2011 and codified as Section 1-20-62 of the APFO, with a sunset provision of five (5) years from the effective date. Notwithstanding a sunset of the School Construction Fee Ordinance, the parties intend: (i) that the Developer shall be bound to pay the School Construction Fee as a condition of APFO approval for the Project at the time of Phase II approval, (ii) that this provision shall survive the sunset of the Ordinance, which shall be deemed to run with the full term of this Agreement and any duly approved extensions thereof and (iii) that payment of the School Construction Fee shall satisfy the Developer’s school adequacy obligations under the APFO (unless the density or intensity of the Project is increased) and any school adequacy obligations that may be enacted in the future. The School Construction Fee shall be paid as provided in Section 1-20-62 of the APFO and in accordance with the fee schedule in effect at the time of plat recordation or the issuance of building permit, as applicable. If after the five year sunset, or for any other reason, the Frederick County Code no longer provides for the calculation of the School Construction Fee, then the school construction fee for purposes of
this Agreement shall thereafter be based on the previous year's fee schedule, adjusted annually per the State of Maryland School Construction Cost Index, for the duration of this Agreement.

B. **School Impact Fees.** Applicable School Impact Fees shall be paid at the time of the issuance of building permits in accordance with the fee schedule in effect at the time of the issuance of building permits.

3.5 **Property Acquisition for Public Infrastructure.**

A. In the event that some of the public infrastructure improvements, at the collector road or higher facility level, required by this DRRA or the APFO LOU to be made by Developer will require the acquisition of public right-of-way from third-party property owners, the Developer shall exercise commercially reasonable efforts to secure such right-of-way without the assistance of the County.

B. In the event that the Developer has demonstrated to the County that it is unable to secure any such public right-of-way despite its commercially reasonable efforts to do so in a timely manner consistent with the construction of public infrastructure improvements, the Developer may request the County (or SHA) to assist in the acquisition of the needed right-of-way at the Developer's sole cost and expense. If the County approves the Developer's request, then the County (or SHA) shall have two years to acquire the needed right-of-way.

C. Should the County decide not to acquire the right-of-way, or the two years has elapsed, then the Developer may be permitted to make a contribution to the County equal to the entire anticipated project development costs, which shall include but not be limited to costs for: design, engineering, right-of-way acquisition, management, inspection, etc. in lieu of constructing the public infrastructure improvements, except as may be otherwise provided for in the applicable APFO LOU. Also, should SHA unreasonably refuse or fail to grant the permits necessary for the construction of improvements referenced in the APFO LOU, the Developer may be permitted to make a contribution to the County in the amount referenced above.

**ARTICLE IV**

**TERM OF AGREEMENT**

This Agreement shall constitute covenants running with the land and shall run with and bind the Property so long as the Project is under development, provided that this Agreement shall terminate and be void twenty-five (25) years after the Effective Date of this Agreement unless extended by an amendment complying with all procedures required in this Agreement, the County Ordinance and the State law. The parties acknowledge and agree that the Term of this Agreement is justified by the: (1) substantial economic investment made and/or to be made by the Developer for the development of the Project; (2) substantial investment in, and construction
of, extensive public and private infrastructure by the parties; (3) public purposes to be advanced by development of the Project in accordance with the Development Laws; (4) uncertainty of future market demands and political pressures; and (5) expectations of the parties.

ARTICLE V
DEVELOPMENT REVIEW

5.1 Timely Development Review. The BOCC agrees to use reasonable efforts to ensure that all remaining Development Approvals, including but not limited to, preliminary plan approval, site development plan approval, final subdivision and final improvement plan review are performed in a succinct, timely manner, without undue delay, consistent with the County’s development review process.

5.2 Timely Submission of Documents. The Developer agrees to use reasonable efforts to submit complete and succinct plans and documents for the remaining Development Approvals as required per County codes, ordinances, policies or procedures, in a timely manner.

ARTICLE VI
SURVIVAL AND TRANSFER OF OBLIGATION

6.1 Nature, Survival, and Transfer of Obligations. The Developer agrees that this Agreement shall run with the land and be binding upon and inure to the benefit of the Developer and its successors and assigns (except owners of an individual lot, unit or parcel improved pursuant to a validly issued building permit and/or dwelling purchased solely for use as a private residence), and upon any and all successor owners of record of all or any portion of the Property (except owners of an individual lot or unit improved pursuant to a validly issued building permit and/or dwelling purchased solely for use as a private residence). To assure that all such successors, assigns, and successor owners have notice of this Agreement and the obligations created by it, the Developer agrees that it shall:

A. Have this Agreement recorded among the Land Records of Frederick County within twenty (20) days after the Effective Date of this Agreement; and

B. Use commercially reasonable efforts to incorporate, by reference, this Agreement into any and all real estate sales contracts entered into after the Effective Date of this Agreement for the sale of all or any portion of the Property.

6.2 Binding Upon Successors and Assigns of The BOCC. The BOCC agrees that all obligations assumed by the BOCC under this Agreement shall be binding on the BOCC, its agencies, governmental units, the Planning Commission and its and their respective successors and assigns, including but not limited to the future County Council and County Executive, when Frederick County transitions to a charter form government.
ARTICLE VII
BREACH AND REMEDIES

7.1 Breach by Developer.

A. Breach-General. If the Developer shall fail or refuse to perform its obligations as required hereunder, then the BOCC shall provide written notice to the Developer indicating the nature of the default. Developer shall have thirty (30) days following the receipt of such written notice to cure the default described in such notice; provided, however, if the Developer shall proceed with due diligence to cure said default after said notice, then such thirty (30) day period shall be extended to such a period of time as may reasonably be required to cure such default while proceeding with due diligence. If the Developer has not cured the default within the said cure period, the BOCC may seek and obtain equitable relief to enforce the terms and conditions of this Agreement either through a decree for specific performance or an injunction. Should the remedies of specific performance or injunction not be available to the BOCC because of actions of Developer, then the BOCC shall be entitled to bring a legal action for damages.

B. Developer hereby waives trial by jury in connection with any proceedings brought to enforce the terms of this Agreement.

7.2 Breach by BOCC.

A. Breach-General. If the BOCC shall fail or refuse to perform its obligations as required hereunder, then the Developer shall provide written notice to the BOCC indicating the nature of the default. The BOCC shall have thirty (30) days following the receipt of such written notice to cure the default described in such notice; provided, however, if the BOCC shall proceed with due diligence to cure said default after said notice, then such thirty (30) day period shall be extended to such a period of time as may reasonably be required to cure such default while proceeding with due diligence. If the BOCC has not cured the default within the cure period, the Developer may seek and obtain equitable relief to enforce the terms and conditions of this Agreement either through a decree for specific performance or an injunction. Should the remedies of specific performance or injunction not be available to the Developer because of actions of the BOCC, then the Developer shall be entitled to bring a legal action for damages.

B. The BOCC does hereby waive trial by jury in connection with any proceedings brought to enforce the terms of this Agreement.

ARTICLE VIII
EFFECT OF DEVELOPMENT REGULATIONS

8.1 Effect of Agreement.
A. Except as otherwise specifically provided herein, the local laws, rules, regulations and policies governing the use, density or intensity of the Property, including but not limited to, those governing development, subdivision, growth management, impact fee laws, water, sewer, stormwater management, environmental protection, land planning and design, and adequate public facilities (hereafter collectively the “Development Laws”), shall be the local laws, rules, regulations and policies, if any, in force on the Effective Date of the Agreement, and the Developer shall comply with all Development Laws.

B. If the BOCC determines that compliance with Development Laws enacted or adopted after the Effective Date of this Agreement is essential to ensure the health, safety or welfare of residents of all or part of Frederick County, the BOCC may impose the change in laws, rules, regulations and policies and the effect thereof upon the Property.

8.2 Approvals Required. Developer shall obtain all approvals necessary under any provision of local, state or federal law before proceeding with development of the Project. Notwithstanding anything to the contrary contained herein, this Agreement does not control or affect laws, regulations or approvals which are not within the control of the County. This Agreement does not address any approvals required by state or federal law and Developer shall be responsible for obtaining any approvals required by state or federal law. The BOCC agrees to provide reasonable assistance to Developer, as necessary, appropriate and consistent with the spirit and intent of this DRRA in Developer’s pursuit of all required state and/or federal laws necessary to complete the Project.

8.3 Fees. Except as provided in Sections 2.4, 3.1 and 3.4.A above, Developer shall pay all fees (specifically including but not limited to impact fees, school mitigation fees and water and sewer connection fees) required by Frederick County at the rate in effect at the time the fee is due. In the event that any such fees, including the school construction fee referenced in Section 3.4.A above, are eliminated by a change in the law and replaced with a procedure or requirement that would impose some other burden on the Developer, the Developer may elect to pay the fee in effect prior to the change in the law. All impact fees shall be paid at the time of building permit. Developer does not waive the right to claim credits for impact fees, excise taxes, surplus capacity reimbursements, water and sewer connection fees, school impact fees and any similar fee or tax credits which may be available in accordance with County policies and regulations. Nothing in this Agreement shall be construed as a waiver or reduction of any such fee.

8.4 Developer’s Reliance. The BOCC acknowledges that the Developer would not make the long term financial commitments necessary to substantially build out the Project in accordance with the Rezoning Ordinance or to provide the proffered infrastructure improvements, without Frederick County’s commitment to allow the Project to be governed by and subject to the Development Laws in effect as of the Effective Date of this Agreement, to the maximum extent permitted by law.

8.5 Moratorium. In the event that a “moratorium” (as hereinafter defined) is declared or imposed, then any lot recordation and the Developer’s rights to construct residential units on
the lots or on the Property pursuant to any Development Approval for any section of the Project shall be extended for one (1) additional day for each day during which such moratorium exists, and the Project shall not be subject to any additional regulation, legislation, limitation, phasing, contributions, penalties or delay in construction, or issuance of zoning certificates/building permits as a result of the moratorium. Further, in the event that a moratorium is declared or imposed, then any deadline concerning the Developer’s obligation to construct, install, fund or post financial guarantees for the infrastructure improvements required pursuant to any Development Approval for the Project shall be extended for one (1) additional day for each day during which such moratorium exists, and the Project shall not be subjected to any additional regulation, legislation, limitation, phasing, contributions, penalties or delay in construction, or issuance of zoning certificates/building permits as a result of the moratorium.

The term “moratorium” shall mean the implementation or declaration by the United States Government, State of Maryland, Frederick County, and/or any agency, department, division and/or branch thereof for purposes of a limitation, prohibition, restriction and/or phasing upon the review, recording, development and construction upon lots in the Project as intended by Developer, or a de facto moratorium imposed by any applicable governmental authority which has the effect of denying the Developer the ability to record lots or obtain permits for the Project pursuant to any Development Approval. Nothing in this Agreement shall be interpreted as exempting Developer from compliance with laws, regulations, and policies of the County or the State, including, without limitation, those of the Maryland Department of the Environment or the Frederick County Division of Utilities and Solid Waste Management concerning the allocation of water and sewer and related matters.

ARTICLE IX
MISCELLANEOUS

9.1 Comprehensive Plan and Regulation Consistency. On _____, 2014, the Planning Commission made the necessary determination as to whether this Agreement is consistent with the Frederick County Comprehensive Plan. By execution of this Agreement, the BOCC has determined that this Agreement is consistent with the Frederick County Comprehensive Plan and with the development regulations of Frederick County, Maryland.

9.2 Public Health, Safety and Welfare. The BOCC has determined that the conditions, terms, restrictions or other requirements of this Agreement are necessary to ensure that the public health, safety and welfare of the citizens of Frederick County are protected.

9.3 Time of Essence. Time is of the essence in the performance of all terms and provisions of this Agreement.

9.4 Notices. All notices and other communications in connection with this Agreement shall be in writing and shall be deemed delivered to the addressee thereof (1) when delivered in person on a business day at the address set forth below; or (2) on the third business day after being deposited in any main or branch United States post office for delivery by properly addressed, postage prepaid, certified or registered mail, return receipt requested, at the address set forth below; (3) upon transmission, if sent by electronic mail, to the e-mail addresses.
set forth below; or (4) on the day following deposit with Federal Express or other national overnight courier.

Notices and communications to the Developer shall be addressed and delivered to the following address:

Lawrence J. Hogan and Ilona M. Hogan
c/o Hogan Companies
2661 Riva Road, Building 300
Annapolis, Maryland 21401
Telephone: 410-266-5100
Email: thogan@hogancompanies.com

with a copy to:

Law Offices of Rand D. Weinberg, LLC
15 North Court Street
Frederick, Maryland 21701
Attn: Rand D. Weinberg, Esquire
Telephone: (301) 698-2350
Email: rweinberg@rdweinberglaw.com

Notices and communications to the BOCC shall be addressed and delivered to the recipients shown below, or the current holder of the office noted:

The Board of County Commissioners of
Frederick County
12 East Church Street
Frederick, Maryland 21701
Attn: Lori L. Depies, County Manager
Telephone: (301) 600-1100
E-mail: ldepies@frederickcountymd.gov

With a copy to:

John S. Mathias, Esquire
County Attorney
12 East Church Street
Frederick, Maryland 21701
Telephone: (301) 600-1030
E-mail: jmathias@frederickcountymd.gov

Gary Hessong, Acting Division Director
Community Development Division
30 North Market Street

Gary Hessong, Director
Director of the Dept. of Permits and Inspections
30 North Market Street
Frederick, Maryland 21701
Telephone: (301) 600-2028
E-mail: ghessong@frederickcountymd.gov
By notice complying with the requirements of this Section, each party shall have the right to change the address or addressee or both for all future notices and communications to such party, but no notice of a change of address shall be effective until actually received.

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.

9.6 Termination or Suspension. The parties to this Agreement may terminate or suspend this Agreement by mutual consent after the BOCC holds a public hearing and complies with all applicable laws concerning termination or suspension of a Development Rights and Responsibilities Agreement as set forth in the County Ordinance. If the BOCC determines that a suspension or termination is essential to ensure the public health, safety or welfare (exercising the same standards as prescribed in Section 8.1.B above), the BOCC may suspend or terminate this Agreement following a public hearing. Any such unilateral termination of this Agreement by the BOCC shall not in any way affect the validity of any Development Approvals which have been obtained for the Project at the time of termination, including, but not limited to, APFO Approvals.

9.7 Authority to Execute. The BOCC hereby acknowledges and agrees that all required notices, meetings, and hearings have been properly given and held by the County with respect to the approval of this Agreement, and the Developer agrees not to challenge this Agreement or any of the obligations created by this Agreement on the grounds of any procedural infirmity or any denial of any procedural right. The BOCC hereby warrants and represents to the Developer that the person(s) executing this Agreement on its behalf have been properly authorized to do so. The Developer hereby warrants and represents to the BOCC (1) that it is the fee simple, record owner of the Property, (2) that it has the right, power and authority to enter into this Agreement and to agree to the terms, provisions, and conditions set forth herein and to bind the Property as set forth herein, and (3) that all legal actions needed to authorize the execution, delivery and performance of this Agreement have been taken.

9.8 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland.
9.9  **Consent to Jurisdiction and Venue.** The parties irrevocably consent to the jurisdiction and venue of the Circuit Court for Frederick County, Maryland or any federal court sitting in the District of Maryland for any proceedings brought with respect to this Agreement.

9.10  **Remedies Cumulative.** Each right, power and remedy of a party provided for in this Agreement, or any other agreement between the parties, now or hereafter existing, shall be cumulative and concurrent and in addition to every other right, power or remedy provided for in this Agreement or any other agreement between the parties, now or hereafter existing.

9.11  **Severability.** In case any one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of the Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in this Agreement.

9.12  **Appeals.** The County DRRA Ordinance allows any person aggrieved by this Agreement to file an appeal to the Circuit Court for Frederick County within 30 days of the date on which the parties execute the Agreement. If the effect of the decision of the Circuit Court revises this Agreement in any material way, then either party to this Agreement may terminate the Agreement by providing notice to all parties to this Agreement within 30 days of the date the Circuit Court decision becomes final and all appeals thereof have been finally determined, and, in this event, the other party so notified hereby agrees to mutually consent to the termination and to comply with all applicable laws concerning termination of a DRRA. Any such termination of this Agreement pursuant to this Section 9.12, shall not in any way affect the validity of any Development Approvals which have been obtained for the Project at the time of termination, including, but not limited to, APFO approvals.

9.13  **Recordation.** Any party may record this Agreement. Unless this Agreement is recorded in the Land Records of Frederick County within 20 days after the date on which the BOCC and the Developer executed the Agreement, the Agreement shall be void. In the event this Agreement is terminated following an appeal as provided for in Section 9.12 above, the parties agree to execute and record a document in the aforesaid Land Records to terminate this Agreement.

9.14  **No Obligation to Approve.** This Agreement shall not be interpreted or construed to impose any legal obligation on the BOCC or any of its boards, agencies, commissions or employees to approve any development, use, density or intensity other than as provided specifically in this Agreement. This Agreement shall not be interpreted or construed to impose any legal obligation on the BOCC to accept any other development requests.

9.15  **No Third Party Beneficiary Status.** The parties specifically agree that this Agreement is not intended to create in the public or any member thereof, third party beneficiary status in connection with the performance of the obligations under this Agreement without the written consent of the BOCC and notwithstanding the BOCC’s concurrence in or approval of the award of any contract or subcontract or the solicitation in fulfilling the obligations of this Agreement.
9.16 **Appropriation Contingency.** The BOCC’s financial obligations, if any, under this Agreement are contingent upon sufficient appropriations and authorization being made by the BOCC for the performance of this Agreement. The BOCC’s decision as to whether sufficient appropriations are available shall be accepted by the other parties to this Agreement and shall be final.

9.17 **Lienholders.** All persons with a lien interest in the Subject Properties have executed this Agreement, and those lienholders with a power of sale have subordinated such liens to the position of the BOCC under this Agreement.

9.18 **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

[SIGNATURES ON FOLLOWING PAGES]
STATE OF MARYLAND, COUNTY OF _________________, TO WIT:

I HEREBY CERTIFY that on this ____ day of __________, 2014, before me, the undersigned officer, personally appeared Lawrence J. Hogan, who acknowledged the foregoing instrument to be his act and deed.

WITNESS my hand and Notarial Seal.

______________________________
NOTARY PUBLIC

My Commission Expires:

STATE OF MARYLAND, COUNTY OF _________________, TO WIT:

I HEREBY CERTIFY that on this ____ day of __________, 2014, before me, the undersigned officer, personally appeared Ilona M. Hogan, who acknowledged the foregoing instrument to be her act and deed.

WITNESS my hand and Notarial Seal.

______________________________
NOTARY PUBLIC

My Commission Expires:
THE BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND

_________________________    BY:_________________________

Blaine R. Young, President

Date:___________

STATE OF MARYLAND, COUNTY OF FREDERICK, TO WIT:

I HEREBY CERTIFY that on this ____ day of __________, 2014, before me, the undersigned officer, personally appeared Blaine R. Young, President of the Board of County Commissioners of Frederick County, Maryland, who acknowledged the foregoing instrument to be his act and deed in such capacity, and that he is authorized to make this acknowledgment.

WITNESS my hand and Notarial Seal.

___________________________________

NOTARY PUBLIC

My Commission Expires:
ATTORNEY’S CERTIFICATION

This is to certify that the undersigned is a member in good standing of the Bar of the Court of Appeals of Maryland, and that the within instruments was prepared by him or under his supervision.

Rand D. Weinberg
EXHIBIT 1

NAMES OF ALL PERSONS HAVING AN EQUITABLE OR LEGAL INTEREST IN THE PROPERTY INCLUDING LIENHOLDERS

Property Owners

1. Lawrence J. Hogan
2. Ilona M. Hogan

Lienholders

NONE
EXHIBIT 2

[LAWYER’S CERTIFICATION THAT APPLICANT HAS EITHER LEGAL OR EQUITABLE INTEREST IN THE PROPERTY]
EXHIBIT 3

[LEGAL DESCRIPTION OF THE PROPERTY]
EXHIBIT 4

[PROPERTY MAP (SHOWING PARCELS/PROPERTIES SUBJECT TO THE DRRA)]
MODERATELY PRICED DWELLING UNITS
PAYMENT IN LIEU AGREEMENT
ADMINISTERED BY
FREDERICK COUNTY, MARYLAND
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
5340 Spectrum Drive, Suite A, Frederick, Maryland 21703

THIS AGREEMENT dated the ___ day of ________________, 2014, by and between
LAWRENCE J. HOGAN and ILONA M. HOGAN (collectively, “Applicant”) and the BOARD
OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND (“County”).

RECITALS

The Applicant has received Planning Commission approval to construct _____ or more
dwelling units on 9.52 acres (more or less) of property owned or controlled by Applicant in the
development known as the 5614 New Design Road project (hereinafter “the Development”),
located in Frederick County, Maryland, subject to the provisions of Chapter 6A of the Frederick
County Code, as amended from time to time and regulations promulgated thereunder.

Ordinance No. 11-20-586 amended the provisions of Chapter 6A of the Frederick County
Code to provide for a payment in lieu option (§1-6A-5.1) to satisfy the requirement to provide
moderately priced dwelling units (MPDUs) as part of certain residential developments; and

This Agreement is intended to document the understanding of the parties with respect to
the payment in lieu obligations of the Applicant consistent with the provisions of Chapter 6A of
the Frederick County Code.

NOW, THEREFORE, in consideration of the mutual promises and benefits provided for
herein, the parties hereto agree as follows:

1. Applicant has received Planning Commission approval to construct a total of
   _____ dwelling units in the Development, which, if the Applicant did not choose the payment in
   lieu option under §1-6A-5.1, would require the construction of ___ MPDUs.

2. In accordance with §1-6A-5.1, the Applicant shall pay to the County a Per
   Dwelling Unit Payment in Lieu of constructing MPDUs in the Development.

3. The Total Payment in Lieu for all dwelling units approved in the Development
   shall be _______ Dollars ($______._), which is the 12.5% of the total number of dwelling units
   approved in the Development multiplied by $17,500.

4. The Per Dwelling Unit Payment in Lieu is _______ Dollars ($______._), which is
the Total Payment in Lieu divided by the total number of dwelling units approved for the Development. The Per Dwelling Unit Fee shall be paid at submission of each building permit application for the dwelling units in the Development.

5. No failure on the part of the County to exercise, and no delay in exercising, any right or remedy permitted by law or pursuant to this Agreement will operate as a waiver thereof. The County may suspend or revoke any or all residential building or residential occupancy permits issued to Applicant for the Development and/or to suspend or deny the issuance of all subsequent residential permit requests by Applicant for this Development, and/or invoke any other of the enforcement measures authorized by Chapter 6A of the Frederick County Code and Regulations adopted pursuant thereto, for failure to comply with the terms of this Agreement or any requirement of Chapter 6A of the Frederick County Code.

6. A waiver by the County of a specific failure to comply with the terms of this Agreement must be in writing signed by the County, and shall not be deemed a waiver of any other subsequent failure to comply of similar or different nature.

7. Any notices or documents sent pursuant to this Agreement must be in writing and delivered to:

Frederick County:

Director
Department of Housing and Community Development
5340 Spectrum Drive, Suite A
Frederick, MD 21703

Applicant:

c/o Hogan Companies
2661 Riva Road, Building 300
Annapolis, Maryland 21401

8. This Agreement is binding upon the agents, successors, heirs and assigns of the Applicant and shall inure to the benefit of and be enforceable by the County, its successors and assigns.

9. Applicant agrees to abide by and comply with all applicable laws and regulations regarding the subject matter of this Agreement, whether or not such laws or regulations are herein specifically enumerated or referred to, and Applicant agrees to sign such documents as may be required to effectuate the intent and purpose of this Agreement.
IN WITNESS WHEREOF, Applicant has caused these presents to be executed by authorized representatives of its sole member.

WITNESS:

__________________________________  __________________________________

STATE OF MARYLAND, COUNTY OF _____________, TO WIT:

I HEREBY CERTIFY that on this _____ day of ___________________, 2014, before me, the undersigned officer, personally appeared ________________, _____________ of ________________, who acknowledged the foregoing instrument to be his act and deed in such capacity, and that he is authorized to make this acknowledgment.

WITNESS my hand and Notarial Seal.

__________________________________

NOTARY PUBLIC

My Commission Expires:

__________________________________

(SIGNATURES CONTINUED ON THE NEXT PAGE)
WITNESS: BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND


By: Jennifer Short, Director
Department of Housing and Community Development

REVIEWED BY: Office of the County Attorney

STATE OF MARYLAND, COUNTY OF FREDERICK, TO WIT:

I HEREBY CERTIFY that on this _____ day of _____________________, 2014, before me, the subscriber, a Notary Public for the State and County aforesaid, personally appeared Jennifer Short, Director, Housing and Community Development, Frederick County, Maryland, and did certify that as such officer, she did execute this instrument for the purposes stated herein, and did certify, under penalties of perjury, that she is authorized to execute this instrument on behalf of the Board of County Commissioners of Frederick County, Maryland.

WITNESS my hand and Notarial Seal.

NOTARY PUBLIC

My Commission Expires:
CONSENT OF LENDER

[If not applicable, write N/A or No Lien] (Lender), holder of the indebtedness secured by the deed of trust [or mortgage] against the property herein described, recorded in Liber _____ at folio _______, hereby consents to the terms and conditions of the foregoing Payment in Lieu Agreement, and does hereby further agree that the terms contained herein shall survive any sale under its deed of trust [mortgage], as evidenced by the signature of the undersigned trustee [or officer of corporation] under the above described deed of trust.

By: [Lender’s name], Trustee

STATE OF MARYLAND, CITY/COUNTY OF ________________, TO WIT:

I HEREBY CERTIFY that on this _______ day of ______________, 2014, before me, the subscriber, a Notary Public in and for the State and County aforesaid, personally appeared _________________, Trustee, who acknowledged her/himself to be the Trustee, and that she/he being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing his/her name.

IN WITNESS WHEREOF, I set my hand and Notarial Seal.

________________________________
NOTARY PUBLIC

My Commission Expires: