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**FREDERICK COUNTY PLANNING  
COMMISSION  
February 20, 2019**

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**TITLE:** Ballenger Run DRRA Amendment

**FILE NUMBER:** DRRA 12-07 (B)

**REQUEST:** Finding of Consistency with Comprehensive Plan

The proposed DRRA amendment will address allowing any dwelling type in Land Bay D and the application of the Excise Tax.

**PROJECT INFORMATION:**

LOCATION: East side Ballenger Creek Pike

ZONE: PUD

REGION: Frederick

WATER/SEWER: S-3/W-3

COMP. PLAN/LAND USE: Medium Density Residential

**APPLICANT/REPRESENTATIVES:** (as applicable)

APPLICANT: SeD Maryland Development LLC

OWNER: SeD Maryland Development LLC

ENGINEER:

ARCHITECT:

ATTORNEY: Bruce Dean

**STAFF:** Jim Gugel, Planning Director

**RECOMMENDATION:** Find consistent with the Comprehensive Plan

**Enclosures:**

Staff report

DRRA amendment and exhibits

February 12, 2019

Frederick County Planning & Permitting Division

Staff Report

**Ballenger Run Development Rights and Responsibilities Agreement Amendment  
DRRA 12-07 (B)**

**ISSUE**

A petition to amend the Development Rights and Responsibility Agreement (DRRA) for the Ballenger Run PUD is presented to the Planning Commission for a finding of consistency with the County Comprehensive Plan. If approved, the proposed amendment will allow the Applicant to construct any type of dwelling in Land Bay D, which is designated for age-restricted housing. The amendment will also address the application of the Excise Tax.

**BACKGROUND**

A petition to amend the Ballenger Run Development Rights and Responsibilities Agreement (DRRA) was submitted by the Applicant, SeD Maryland Development LLC, on October 19, 2018. The petition was reviewed and accepted by the County Executive, which allows it to proceed through reviews by the Planning Commission and County Council.

**Ballenger Run Development History**

The Ballenger Run property (197 acres) was rezoned (R-05-09) from Agricultural to Planned Unit Development (PUD) in 2006 (Ord. # 06-33-429, effective September 28, 2006). The Phase I Plan was approved for 970 dwellings, all age-restricted.

A rezoning application, R-05-09 (A), to revise the Ballenger Run PUD Phase I Plan was filed on December 28, 2012. This application proposed removal of the age-restriction condition and reduction of the proposed number of dwellings to 855. Concurrent with the rezoning review was the filing of a petition (December 27, 2012) to enter into a DRRA, which also included the Adequate Public Facilities review. The revised Phase I Plan for the PUD was approved on October 1, 2013 and became effective on October 17, 2013 (Ord. # 13-20-648). The Phase I Plan includes the following components:

- Approval for a total of 855 dwellings with the following dwelling types:
  - Single-Family – 180 dwellings
  - Townhouses – 265 dwellings
  - Multi-Family – 210 units
  - Assisted/Independent Living – 200 units
- Dedication of a 14 acre elementary school site
- Dedication of 34 acres of park land along Ballenger Creek to the county

The project received Preliminary Subdivision/Site Plan approval (Phase II) from the Planning Commission on October 8, 2014. As of December 2018 355 dwellings have been constructed or permitted.



- Construct or pay for/guarantee water and sewer improvements as detailed in the Amended and Restated LOU.
- Pay the APFO school construction fees (based on failure at the elementary and high schools) as detailed in the Amended and Restated LOU. Based on current rate and unit mix, this would provide approximately \$3.4 million in mitigation fees. (Note this is in addition to the school impact fees which would generate approximately \$6.3 million based on the current rate and unit mix)
- Remit the payment in lieu fees under the Moderately Priced Dwelling Unit regulations.
- Pay all normal and customary development review fees and impact fees.
- Dedicate a +/-13 acre elementary school site.
- Construct multi-use trails along Ballenger Creek and Pike Branch.
- Dedicate 34.3 acres of parkland (subject to approval by the county) along Ballenger Creek.

### **PROPOSED DRRA AMENDMENT**

This petition proposes the second amendment to the DRRA. The amendment proposes language that would allow for any type of age restricted dwelling unit on Land Bay D, The current DRRA and Phase I Plan allow only age restricted, multi-family dwellings in Land Bay D.

The amendment also includes language regarding the application of the Excise Tax to unbuilt dwellings after February 21, 2023.

The applicants have also submitted a Phase I Plan amendment to revise the rezoning condition language (condition #9) to remove the reference to multi-family dwellings that will allow for any dwelling type and add language to condition age restriction for all dwelling units in Land Bay D.

### **FINDING OF CONSISTENCY WITH THE COMPREHENSIVE PLAN**

The Land Use Article of the Annotated Code of Maryland provides general requirements with regard 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 following excerpt is from the Maryland Department of Planning Models and Guidelines Document titled: ‘*Achieving Consistency under the Planning Act*’. It states:

*The fundamental concept of “consistency” under the new Planning Act is that land use regulations and decisions should agree with, and implement what the Plan recommend 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.*

**County Comprehensive Plan**

Staff would find that the proposed DRRA amendment, DRRA 12-07 (B) is consistent with the following policies of the County Comprehensive Plan.

- HO-P-03 Reasonably accommodate the housing needs of all residents in an effort to allow them the option of remaining in the County.
- HO-P-05 Encourage higher density, mixed-use and mixed-income development in designated growth areas where a balance of housing types and styles are offered to meet the diverse housing needs of residents.
- TR-P-18 Support coordinated efforts to pursue Federal, State, local, non-profit and private funding for transportation improvements.
- MG-P-23 Include a variety of housing types in all communities

**RECOMMENDATION**

Staff finds the proposed Ballenger Run DRRA amendment, DRRA 12-07 (B) to be consistent with the County Comprehensive Plan.

**PLANNING COMMISSION ACTION**

**MOTION TO FIND CONSISTENT**

I move that the Planning Commission find the Ballenger Run DRRA amendment, DRRA 12-07 (B) to be **consistent** with the Frederick County Comprehensive Plan based on the findings and conclusions of the staff report and evidence presented at the meeting.

**SECOND AMENDMENT TO DEVELOPMENT RIGHTS AND  
RESPONSIBILITIES AGREEMENT**

THIS SECOND AMENDMENT TO DEVELOPMENT RIGHTS AND RESPONSIBILITIES AGREEMENT (this “**Second Amendment**”) is made this \_\_\_\_ day of \_\_\_\_\_, 2018, by and between **SeD Maryland Development, LLC**, a Delaware limited liability company (“**Owner**”), successor to RBG Family LLC (“**RBG**”), and **Frederick County, Maryland**, a body corporate and politic of the State of Maryland (“**County**”) (Owner and County are sometimes referred to collectively herein as the “**Parties**”).

**Recitals**

**WHEREAS**, on or about October 17, 2013, RBG and the Board of County Commissioners of Frederick County, Maryland (“**BOCC**”) entered into a Development Rights and Responsibilities Agreement (the “**Original DRRA**”) for the development of real property more particularly described on Exhibit A (the “**Property**”), which is attached hereto and incorporated herein. The Original DRRA is recorded among the Land Records of Frederick County (“**Land Records**”) at Liber 09814, folio 0012.

**WHEREAS**, on December 1, 2014, the County transitioned from the county commissioner form of government to a county charter form of government under which there is an executive branch with a county executive and a legislative branch with a county council.

**WHEREAS**, on November 23, 2015, RBG conveyed the Property, by deed, unto Owner, which was recorded on December 2, 2015 among the Land Records in Liber 10880, folio 403. A copy of this deed is attached hereto and incorporated herein as Exhibit B.

**WHEREAS**, on September 6, 2016, the Parties amended the Original DRRA through the execution of that certain Amendment to Development Rights and Responsibilities Agreement recorded among the Land Records in Liber 11362, folio 444 (the “**First Amendment**”), in order to allow the Owner to develop the Property in accordance with the provisions of Bill No. 15-06,

which took effect September 5, 2015 and made certain amendments to the County's MPDU requirements (the Original DRRA, as amended by the First Amendment, is hereinafter collectively referred to as the "**DRRA**").

**WHEREAS**, Article III, Section 3.3.B. of the DRRA sets forth certain development limitations for the Property, and specifically limits the overall density of residential development on the property to 855 dwelling units, and restricts the mix of units to a maximum of 445 single-family (attached and detached units) and 410 multi-family or condominium units.

**WHEREAS**, Article III, Section 3.3.B. of the DRRA further provides that the 410 multi-family or condominium units include two hundred (200) units which Owner may construct either as a 200-unit Continuing Care Retirement Community ("**CCRC**") or as 200 multi-family age-restricted residential units in accordance with the terms of the Phase I approval for the All-Age PUD.

**WHEREAS**, on \_\_\_\_\_, 2018, the Frederick County Council ("**FCC**") amended Rezoning Ordinance #13-20-648 for the All-Age PUD to expand the units types permitted to be constructed within the portion of the Property originally designated for development as either a 200-unit CCRC or as 200 age-restricted multi-family residential units (the "**Amended Rezoning Ordinance**"). The Amended Rezoning Ordinance grants Owner the discretion to develop this portion of the Property, which is identified as Land Bay D on the Phase 1 Concept Plan, with a maximum of two hundred (200) age-restricted residential units of any type.

**WHEREAS**, believing it to be in the best interests of the County, its citizens, the Owner, and the orderly development of the Property, the Parties wish to amend the DRRA to be consistent with and to permit development of the Property in accordance with the Amended Rezoning Ordinance.

**WHEREFORE**, Owner and County agree as follows:

1. The Recitals above are adopted and fully incorporated herein.
2. The first four (4) sentences of Article III, (Zoning, Development Limitations, Permits and Plan Consistency), Section 3.3B (Development Limitations), of the DRRA are deleted and replaced in their entirety as follows:

“B. *Development Limitations* – The permissible uses on the Property for the All Age PUD are those permitted in the County Code in effect as of the date of this DRRA. The Property shall be developed in accordance with, and subject to the conditions and requirements of amended Development Approvals that are required pursuant to County Code, which Development Approvals shall be based upon the terms and conditions of this Agreement. Total density of residential development on the Property shall not exceed, collectively, 855 dwelling units. A maximum of 445 single-family (attached and detached units) and 210 multi-family or condominium units may be constructed within the areas identified as Land Bays A, B, C, E, F, and G on the Phase 1 Concept Plan. In accordance with the terms of the Phase I approval for the All Age PUD, the area identified as Land Bay D on the Phase 1 Concept Plan may be developed, at Owner’s discretion, either as a 200-unit Continuing Care Retirement Community (“CCRC”) or as a maximum of 200 age-restricted dwelling units. The mix of unit types within the All Age PUD shall be at Owner’s discretion, subject to County approval and meeting all other County requirements, including, but not limited to, those set forth in the Adequate Public Facilities Ordinance.”

The remaining language of Section 3.3B (Development Limitations) remains unmodified and in full force and effect.

3. Section 4.2B (Building Excise Tax) is hereby deleted and replaced with the following:



“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 zero dollars (\$0) by Ordinance No. 11-23-589. In recognition of the overall package of road improvements being funded by the Owner, including substantial funding contributions for regional road improvements as set forth in the All Age APFO LOU attached hereto as Exhibit “E”, the excise tax shall remain at zero dollars (\$0) until the expiration of the All Age APFO LOU on February 21, 2023. The Owner hereby agrees that upon expiration of the All Age APFO LOU on February 21, 2023, and retesting of the All Age PUD Project under the Adequate Public Facilities Ordinance, the Owner will pay all building excise taxes required by the County Code from and after February 21, 2023.”

4. Except as modified and amended above, all terms contained in the DRRA shall remain in full force and effect. Should any portion of this Second Amendment be ruled illegal by an authorized court of law, the remainder of this Second Amendment shall continue in full force and effect.

5. This Second Amendment, and the attachments hereto, contains the entire agreement between and among the Parties in relation to the specific matters described herein and no inducements or promises other than as expressly set forth herein have been given or received in return for the same. All negotiations leading up to this Second Amendment in regard to the matters specifically agreed to herein are merged with this written Second Amendment. Except as expressly provided in this Second Amendment, no term or entitlement herein may be waived by either party to this Second Amendment, except to the limited extent and scope expressly done in writing, signed by both Parties, and this Second Amendment may only be amended in writing signed by all of the undersigned signatories. This Second Amendment is the result of joint negotiations and drafting between the undersigned Parties and their respective legal counsel and any rule of construction purporting to require construction of terms for or against its drafters is waived and inapplicable.

6. The County shall record this Second Amendment in the Land Records within 20 days after execution.

**SeD MARYLAND DEVELOPMENT, LLC**, a  
Delaware limited liability company  
By: SeD Development Management, LLC,  
Manager

\_\_\_\_\_  
Witness

\_\_\_\_\_ (SEAL)  
By: Charles W.S. MacKenzie, Manager

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STATE OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2018, before me, the Subscriber, a Notary Public in and for the State and County aforesaid, personally appeared Charles W.S. MacKenzie, Manager of SeD Development Management, LLC, Manager of SeD Maryland Development, LLC, a Delaware limited liability company, and he did acknowledge the foregoing instrument to be the act and deed of SeD Maryland Development, LLC by its Manager, SeD Maryland Development, LLC.

WITNESS my hand and Notarial Seal.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission expires: \_\_\_\_\_

**FREDERICK COUNTY, MARYLAND,**  
a body corporate and politic of the State of Maryland

\_\_\_\_\_  
Witness

By: \_\_\_\_\_(SEAL)  
Jan H. Gardner, County Executive

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STATE OF MARYLAND, COUNTY OF FREDERICK, TO WIT:

I HEREBY CERTIFY that on this \_\_\_\_ day of \_\_\_\_\_, 2018, before me, the subscriber, a Notary Public in and for the State and County aforesaid, personally appeared Jan H. Gardner, the County Executive and an authorized signatory on behalf of Frederick County, Maryland, a body corporate and politic of the State of Maryland, and acknowledged the foregoing instrument to be the act of Frederick County, Maryland, and is duly authorized to make this acknowledgment on its behalf.

WITNESS my hand and Notarial Seal.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission expires: \_\_\_\_\_

**APPROVED FOR FORM AND LEGAL SUFFICIENCY**

This instrument has been prepared under the supervision of the undersigned, an Attorney duly admitted to practice before the Court of Appeals of Maryland.

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Bruce N. Dean, Attorney

**Exhibit A**

(Legal Description of Property)

**Exhibit B**

(RBG Family LLC Deed to SeD Maryland Development, LLC)