

ANNUAL REPORT OF THE  
NEW CASTLE COUNTY PLANNING BOARD  
FOR 2009

To: The Hon. Christopher Coons, County Executive, New Castle County  
The Hon. Paul G. Clark, Council President, New Castle County  
Members, New Castle County Council

From: Victor Singer, Chairman

Dated: March 30, 2010

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RELEVANT ORDINANCE from the *New Castle County Code*:

Sec. 2.04.001. Annual reports.

All New Castle County Boards, Committees, and Commissions shall be required to submit an annual report to the County Executive and County Council no later than April 1st of each year. The report shall outline the board, committee, or commission's mission, accomplishments of the year, any challenges to the performance of its functions and suggestions for changes for that specific board, commission, or committee.

Sec. 2.04.002. Annual by-law review

All New Castle County Boards, Committees, and Commissions shall annually review and if necessary update its by-laws.

MISSION OF THE PLANNING BOARD:

The Planning Board (the "Board") is an independent board, created by State law, to wit, 9 *Del.C.* §1303. The Board is comprised of nine [9] members, who serve terms of three [3] years, except for the Chairperson, who serves at the pleasure of the County Executive. The members are appointed by the County Executive, with advice and consent of the County Council. They are compensated as determined by County Council. They must be residents of New Castle County.

The underpinning of the Board's mission is found in Sections 1304 and 1305 of Title 9 of the *Delaware Code*:

The Planning Board's mission is to consult with the New Castle County Land Use Department (the "Department") concerning the work performed by the Department and, further, to review the proposed comprehensive development plan and all proposed amendments and revisions to the Unified Development Code, including proposed zoning and subdivision regulations. After review of any such proposals, the Board shall report to

County Council its recommendations with respect to actions to be taken in connection with such proposals.

Further specificity of the Board’s function can be found in the *New Castle County Code*:

Sec. 40.30.310. Planning Board.

The Planning Board shall consist of nine (9) members having the following powers and duties.

- A. To review, hear, consider and make recommendations to approve or disapprove applications for zoning map and Code text amendments, as indicated in Table 40.30.110.
- B. To initiate, prepare or cause to be prepared a zoning or land development code or amendments thereto, and make recommendations to County Council and the County Executive as the Board deems appropriate.
- C. To prepare or cause to be prepared the Comprehensive Development Plan, or any element or portion thereof, and make recommendations to County Council and the County Executive as the Board deems appropriate.
- D. To initiate, review, hear, consider and make recommendations to County Council and the County Executive to approve or disapprove amendments to the Comprehensive Development Plan.
- E. To adopt additional or amended rules of procedure consistent with this Section to govern the Planning Board's proceedings.
- F. To conduct studies of the County's resources and needs and to report its findings and recommendations, with reference thereto, from time to time, to County Council and the County Executive.
- G. Any other power or duty provided for under State law or indicated in Table 40.30.110 of this Article.

ACCOMPLISHMENTS:

Except in the case of rescheduling for holidays, the Board holds public hearings on the first Tuesday evening of every month, or more often as need dictates. These public hearings are jointly held by the Board and the Land Use Department. The Board’s business meeting is typically held on the third Tuesday morning of every month. From January 2009 through December 2009, the Board held thirteen (13) public hearings. The chart, below, provides an accounting of the types and numbers of applications heard by the Board:

| PB PH Date | Exploratory Plans | Preliminary Plans/TAC | Rezoning | Deed Restriction Changes | Text Amendments | Subdivision Appeals/Variations |
|------------|-------------------|-----------------------|----------|--------------------------|-----------------|--------------------------------|
| 1/6/09     | 1                 | 1                     | 0        | 0                        | 1               | 0                              |
| 2/3/09     | 2                 | 2                     | 0        | 1                        | 0               | 0                              |
| 3/3/09     | 3                 | 2                     | 0        | 0                        | 1               | 0                              |
| 4/7/09     | 3                 | 2                     | 1        | 0                        | 0               | 0                              |
| 5/5/09     | 2                 | 2                     | 0        | 0                        | 0               | 0                              |
| 6/2/09     | 0                 | 2                     | 0        | 0                        | 0               | 1                              |
| 7/7/09     | 2                 | 1                     | 0        | 0                        | 1               | 0                              |

|                     |           |           |           |          |          |          |
|---------------------|-----------|-----------|-----------|----------|----------|----------|
| 8/4/09              | 2         | 4         | 1         | 0        | 0        | 0        |
| 9/1/09              | 0         | 2         | 0         | 0        | 4        | 0        |
| 10/6/09             | 1         | 1         | 0         | 0        | 1        | 0        |
| 11/3/09             | 1         | 0         | 1         | 0        | 0        | 0        |
| 12/1/09             | 1         | 1         | 4         | 0        | 0        | 0        |
| 12/2/09             | 0         | 0         | 4         | 0        | 0        | 1        |
| <b>TOT -<br/>60</b> | <b>18</b> | <b>20</b> | <b>11</b> | <b>1</b> | <b>8</b> | <b>2</b> |

As in 2008, during the 2009 calendar year, a number of the applications presented at the public hearings included land development plans under the relatively recently adopted (and subsequently amended) “Workforce Housing” ordinance. Additionally, some of the applications implicated the redevelopment provisions in the Unified Development Code (“UDC”). Very often, the hearings that included these applications drew large crowds and resulted in negative public feedback. Although the Board does not necessarily make recommendations to County Council on these applications, the Board continues to be uniquely positioned to serve as a ‘buffer’ between the public-at-large and County Council.

During 2009, the Planning Board created a committee to study possible UDC proposed amendments. Such study is on-going, and the committee has made the following comments for potential amendments to the current UDC provisions:

*Density Bonuses:*

Numerous UDC Articles authorize density bonuses, in some instances on a "Not To Exceed X%" basis and in other instances on an "All Or Nothing" basis. No clear reason for the distinction has been given. Further, there appears to be no limit on how much stacking of such bonuses is permissible.

Preferably, all the bonuses should be on a "Not To Exceed" basis unless a clear reason for the "All or Nothing" approach is provided. Also, there should be a ceiling on bonus stacking.

*Definitions:*

From time to time, expansions, extensions or enlargements of existing uses have appeared as redevelopment proposals. Expansions, extensions and enlargements are required to be UDC compliant. But redevelopments are allowed to fall short of full compliance when the site after redevelopment will be closer to UDC compliant than it was before.

Further, density bonuses and other incentives apply to redevelopment in some respects and under some circumstances, but not to expansions, extensions or enlargements. Since clear distinctions among these terms are absent, the redevelopment bonuses and incentives have occasionally been sought for simple expansions, extensions or enlargements.

The list of definitions in the UDC should be refined to clarify that "redevelopment" (presently defined) is not synonymous with "expansion" (presently undefined), or with "extension" or "enlargement."

*High Cost and Low Cost Compliance Improvements Should Not Be Equal:*

In meeting the UDC's interesting 400% cumulative improvement requirement for noncompliant "design elements" of a redevelopment project, the developer sometimes gets as much credit for providing a bicycle storage rack as for a bufferyard expansion, a heroic storm water flow volume and quality improvement, or a substantial contribution to offsite transportation system improvements.

The UDC already provides an approach for quantifying the percent improvement for individual design elements. Multipliers should be provided reflecting relative values for the several design elements, along with a minimum proportion of the total number of such noncompliant elements that must be improved under the 400% rule.

*Realities of Today's World:*

All of us got a wake-up call on 9/11/2001 about the potential for loss of life and property and disruption of the workings of our society occasioned by acts of terrorism. Other terrorism attempts continue and there's no reason to expect them to end. Heeding those calls, we should minimize the opportunity that land use features particularly susceptible to terrorism can be built into new construction.

UDC Article 10 acknowledges the County's responsibility, via land use controls and parallel controls in the building code, to prevent contamination of soils, surface waters and sewers by containing spills from aboveground storage tanks for hazardous substances and petroleum products. The

provision requires design to fully contain all spills within a secondary containment facility.

Historically, such containments are designed to protect against two "natural" hazard extremes: Sloshing of the contents due to earthquake loadings (the New Castle County Building Code contains the relevant requirements); and the potential for brittle fracture of a completely filled tank on a cold winter night. (Steel and other metallic materials are temporarily embrittled during low temperature exposures.)

There are so many aboveground tanks for hazardous materials in Delaware that a 40 year life assumption leads to one tank replacement every month on average for tanks larger than 12,500 gallons, and one every four months for tanks larger than a million gallons, for hazardous materials only.

At the State level, under authority of the Jeffrey Davis Aboveground Storage Tank Act (passed in 2002), DNREC adopted a regulation in June 2004. Prior to that regulation, aboveground tanks were regulated only by local codes. DNREC's requirements for containments around multiple tanks demand a volume barely larger than the largest of the several tanks within. That's sufficient for rupture of ONE full tank within a single containment on a cold winter night or during an earthquake. Premised on the improbability of simultaneous loss of two such tanks within a single containment, DNREC's required containment volume is perhaps sufficient for the worst "natural" event.

Terrorism isn't a "natural" event. But it's a REAL possibility in the world of today and tomorrow. Moreover, shattering of such a tank could easily result from a high powered rifle or Bazooka projectile. The terrorists on 9/11 attacked with FOUR airplanes; those on 4/11 in Spain attacked FOUR railroad trains; and those in London attacked FOUR subway trains.

A terrorist attacking a hazardous material tank farm is hardly likely to forget his goal after shattering the first tank. The containment for all NEW hazardous material tank installations should be sufficient for the CUMULATIVE volume of ALL the tanks within. Yet when approached to impose such a requirement, DNREC insisted it doesn't have statutory authority to deal with terrorism.

Existing law - - the UDC - - already reflects the County's authority to deal with the potential for streamwater, groundwater and sewer contamination. It just needs some further refinement. Suggested text follows:

Recommended: add sub-paragraphs 1 and 2, as follows, to UDC Section 40.10.600.C:

1. For the purposes of this section, dikes, berms, retaining walls, curbs, diversion ponds, holding tanks, sumps and vaults not susceptible to damage in the same event that damages the aboveground storage tank (AST) itself, are acceptable means of secondary containment. Configurations susceptible to be damaged in the same event that damages the AST itself, such as the secondary wall of a double-walled tank and the external liner of a tank so equipped, are unacceptable means of secondary containment for the purposes of this section.

2. The secondary containment system shall have volume sufficient to contain 110% of the cumulative volume of all ASTs within the contained area or 100% of the cumulative volume of all ASTs within the secondary container area plus six inches of freeboard for precipitation.

The Board, once again this year, undertook a comprehensive review of its Bylaws, and is in the process of such review. Further, the Board is actively reviewing its Special Rules of Order, Public Hearing Procedure (adopted January 2009), and a revised version of the Special Rules of Order will likely be adopted during the April 2010 business meeting. Also, in 2009, the Board heard, discussed and issued written decisions on two subdivision variance applications. Additionally, the Board heard, discussed and issued written decisions on one appeal from an administrative decision of the Department of Land Use, Application No. Application 2008-0596-SA. The Board's Bylaws, business meeting minutes, and written decisions on the administrative appeals can be located on the Department of Land Use website at this address: <http://www.co.new-castle.de.us/landuse/home/webpage4.asp>. In the alternative, for information, please contact the Board's counsel, Julie M. Sebring, NCC Office of Law, at (302) 395-5130.