FINAL
MINUTES - BUSINESS MEETING
NEW CASTLE COUNTY PLANNING BOARD
87 READS WAY, NEW CASTLE, DELAWARE
July 16, 2013

The Business Meeting of the Planning Board of New Castle County was held on Tuesday, July 16, 2013, in the New Castle Room of the Government Center Building, 87 Reads Way, Corporate Commons in New Castle, DE.

The meeting was called to order by the Chairman at 9:03 AM.

The following Board members were present:

Richard Killingsworth
William McGlinchey
Robert McDowell
Robert Snowden
Sandra Anderson
Ruth Visvardis
Leone Cahill
David Sheppard
Arthur Wilson

The following Board members were absent:

None

Planning Board Attorney, Department of Law

Wil Davis

The following Department of Land Use employees were present at the meeting:

Jim Smith, Acting General Manager
Matthew Rogers
Valerie Cartolano
Ken Bieri

The following members of the public signed in:

Jeff Seemans
Christy Flynn
Councilman George Smiley
Nancy Willing
Shawn Tucker
Craig Robert Lewis
Adam Taylor
Jordyn Pusey
Phillip Tolliver
Dev Sitaram

MINUTES

On a motion by Mr. McDowell and seconded by Ms. Visvardis, the Board voted to approve the April 16, 2013 Business Meeting Minutes.

On a motion by Mr. Sheppard and seconded by Ms. Cahill, the Board voted to approve the June 18, 2013 Business Meeting Minutes.

DEFERRALS

There were no deferrals.

BUSINESS

App. 2012-0603-S/Z. East side Summit Bridge Road (SR 896), south of Porter Road and north of Howell School Road. Exploratory Major Land Development Plan, Rezoning, and PLUS Review for **Colony at Summit Bridge – East** proposes to rezone a portion of the property to ST for a residential open space planned development option for 150 dwellings (39 single-family detached, 24 single-family twin units, and 87 single-family townhouse units). Ord. 13-011 will rezone 45.32 acres from S (Suburban) to ST (Suburban Transition) and will amend the Comprehensive Plan consistent therewith. CD 6.

The Department has considered the *Standards for Zoning Map Amendment* in Section 40.31.410, A through E, the proposed plan, and comments received from agencies and the public. Based on this analysis the Department is of the opinion that the standards are met by this proposal. The Department of Land Use recommends **APPROVAL** of Ordinance 13-037.

The Planning Board considered the recommendation offered by the Department of Land Use. Mr. Wilson and Mr. Sheppard stated they were not present at the June 4, 2013 public hearing for this application, but both confirmed they had read the hearing transcript and were prepared to participate in discussion and voting. The Planning Board agreed with the Department of Land Use analysis and reasoning. On a motion by Mr. McDowell, and seconded by Ms. Cahill, the Board voted to recommend **APPROVAL** of Ordinance 13-037. The motion was adopted by a unanimous vote of the full board, **9-0** (YES: *Anderson, Cahill, Killingsworth, McDowell, McGlinchey, Sheppard, Snowden, Visvardis, Wilson).*

There was no discussion prior to the vote.

App. 2013-0128-S/Z. East side Centerville Road, southeast of exit ramp, north of Century Blvd. Exploratory Major Land Development Plan, Rezoning, and PLUS Review for **Walmart Expansion – Price's Corner** proposes to rezone a 5.33 acre parcel from S to CR to build a 43,455 sf expansion and additional parking to the existing retail store. Ord. 13-036 will rezone 5.33 ac. From S (Suburban) to CR (Commercial Regional). CD 1.

The Department has considered the Standards for Zoning Map Amendment in Section 40.31.410, A through E, the proposed plan, and comments received from agencies and the public. Based on this analysis the Department is of the opinion that the standards have been addressed and debated by the applicant and others. And while each of these legal factors to be considered have pro and

con arguments for and against the rezoning of the property, the Department of Land Use recommended **DENIAL** of Ord. 13-036. If County Council determines that the rezoning should be approved, it is suggested that the applicant and the community continue to explore ways to provide safe and effective mitigation to permit continued pedestrian and bicycle access between the community and the Wal-Mart property.

The Planning Board considered the recommendation offered by the Department of Land Use, however, the Board disagreed with the final analysis and reasoning of the report. On a motion by Mr. Wilson and seconded by Mr. Snowden, the Board voted to recommend **APPROVAL** of Ord. 13-036. The motion was adopted by a vote **5-2-2** *(YES: Cahill, McDowell, Snowden, Visvardis, Wilson; NO: Anderson, McGlinchey; Not Voting: Killingsworth, Sheppard).*

In discussion preceding the vote the Board offered the following comments:

Ms. Anderson requested a clarification as to the legal owners of both the existing Wal-Mart property and the 5.3 acre parcel proposed for rezoning. She also wondered whether it was appropriate for Wal-Mart to promise certain limitations in the community deed restrictions if Wal-Mart was not the property owner. It was noted that the Market Place Company was the legal owner of both parcels (Wal-Mart is the lessor) and that the draft declaration of restrictions put forward by Mr. Tucker binds the Market Place Company as the owner and guarantees the covenants against the Market Place Company and its successors and assigns. Ms. Anderson noted deed restrictions can always be changed and her opposition to the rezoning is based on the long-term uncertainty of the deed restrictions to protect the community.

Ms. Visvardis reiterated her concern regarding conflicts between a possible bus route and stop on the Wal-Mart site and tractor-trailers delivering merchandise to the store. She also asked why the Planning Board is considering the rezoning prior to a final DelDOT review and report. Mr. Killingsworth reported that the rezoning process does not require the TIS to be completed prior to a Planning Board recommendation.

Mr. McGlinchey asked for a clarification from the Department that the expansion proposed on the 5.3 acre parcel could be accommodated on the existing Wal-Mart site without using any part of the 5.3 acre parcel. The Department reported that the existing Wal-Mart 19-plus acre site has a site capacity of 308,483 square feet and could accommodate the expansion and the necessary parking. It was pointed out that the expansion is now proposed at the property line with the 5.3 acre parcel and that the expansion would need to be relocated since it is too close to the 5.3 acre property line.

Mr. Wilson sought to further explain the reasons behind his motion. He noted that while there appear to be a host of issues and concerns from the adjacent community, those issues and concerns could become moot if the rezoning is denied and Wal-Mart moves forward with its expansion plans on-site. If this happens, he was concerned that the County, the Department, and the local citizens lose opportunities to gain improvements to the adverse impacts and issues already identified with the existing development. He believes the rezoning of the 5.3 acre parcel and the eventual recording of the deed restrictions with the community, including the prohibition of access to Washington Avenue is the better of the two options that will provide the best protection to the Roselle and Christianshire communities. Mr. Wilson reminded the Board that

the 5.3 acre parcel has little purpose except to serve as an expansion option for Wal-Mart or to be developed independently and probably to the detriment of the community.

Mr. McDowell reminded Board members that while the Department's report indicated that the declaration of restrictions proposed by the applicant would be in perpetuity, he suggested that in perpetuity really only means until such time as it changed by the parties involved.

Mr. McGlinchey suggested that the need for the rezoning is caused by Wal-Mart's need to or desire to expand. While they could accommodate the expansion on-site, it is likely that the option is more difficult and obviously not the desired one. Mr. Snowden submitted that Wal-Mart's desire to use the 5.3 acre parcel also preserves and protects a portion of the vegetated buffer that currently protects the community. The proposed deed restrictions will insure that such protection will continue.

Mr. Killingsworth sought a final review of the rezoning proposal and the likely consequences of what might happen if the 5.3 acre parcel is developed independently. The Department noted that if access could not be gained through the Wal-Mart property then it is likely a road or access drive would be connected to Washington Avenue.

App. 2013-0249-SA. West of US 13 and SR 1 across from Vance Neck Road and south and east of Commodore Estates and north and east of Drawyer Creek. This is a **Subdivision Appeal** from a Department of Land Use final decision dated March 13, 2013 that the submission of the **Shannon Cove** Exploratory Plan (2012-0330-S) was incomplete. The plan proposes an increase to the number of single family lots from 409 to 466 and will reconfigure streets and open space. The plan was submitted without the requisite signatures of one hundred (100) percent of the legal property owners. S (Suburban) zoning district. CD 12.

Requested: By and through its attorney, John E. Tracey, Esq., D.R. Horton, Inc. (the "Applicant") filed an administrative appeal seeking to reverse a decision of the Department of Land Use (the "Department"), pursuant to the New Castle County Unified Development Code ("UDC"), Section 40.31.510.

The New Castle County Planning Board (the "Board") held a public hearing on this appeal on July 2, 2013. Prior to the hearing, the Board received and reviewed submissions from the Applicant and the Department, including legal memoranda. During the public hearing, the Board voted to allow supplementation of the record. The Board voted on the appeal during its business meeting on July 16, 2013. This written decision is based upon the Board's discussion of the issues presented during the public hearing and its vote on those issues at its July 16, 2013 business meeting.

The Board denies the Applicant's appeal as untimely. Under County Code, the time period to appeal a final, adverse decision of the Department expires 20 days after the Department generates the decision. In this case, the Department issues its final decision on June 1, 2012, and the Applicant filed its appeal on March 28, 2013. Thus, the Board denies the appeal as untimely.

Procedural Background: On May 18, 2012, the Applicant filed a Record Major Subdivision Plan application (the "Revised Plan") that requested a revision of its Record Re-subdivision Plan for Shannon Cove, which was recorded in 2009. In addition to the Revised Plan, the Applicant

submitted a certification that it was the record owner of at least 2/3 of the lots shown. The Department requested additional information on May 22, 2012. On June 1, 2012, the Department issued a written decision that the submission was incomplete and was not statutorily compliant. Specifically, the Department noted that although the New Castle County Code ("Code") requires the signatures of 2/3 of the lot owners when an application proposes changes to open spaces or common facilities, such is not the case when the redesign of a development "goes significantly beyond" changing open spaces. Due to the nature of the proposed changes in the Revised Plan, the Department stated the Applicant needed to obtain consent from 100% of the lot owners with an interest in the subdivision.

On June 15, 2012, the Applicant sent a letter to the Department in which it disputed the Department's decision that 100% of the lot owners' signatures were required to incorporate the changes delineated in the Revised Plan. In its letter, the Applicant asked the Department to "reconsider" its decision and deem the Revised Plan application complete. The Applicant did not thereafter appeal the Department's June 1st decision. Rather, it resubmitted its Revised Plan application on October 2, 2012 to address the deficiencies noted in the Department's June 1st decision. Accordingly, along with the Revised Plan, the Applicant submitted a Power of Attorney which purported to give the Applicant the authority to act on behalf of all the other lot owners. On October 9th, the Department returned the application to Applicant, stating that it was incomplete because all of the issues outlined in the Department's June 1st decision had not been addressed. On October 17th and 26th, the Applicant requested a written decision from the Department regarding the October submission of the Revised Plan. On October 26th, the Department sent an email that further clarified its position regarding the correct percentage of lot owners' signatures required for the application to be considered a complete submission.

On November 5, 2012, the Applicant made another request for a written decision stating why the Department did not deem the October submission as complete. On March 13, 2013, the Department sent the Applicant a letter which served as a "summary of the issues involving the Shannon Cove Exploratory Sketch Plan . . . application and a recapitulation of the Department's position on the Plan application." The Applicant's instant appeal followed, on March 28, 2013.

CONTENTIONS OF THE PARTIES

Contentions of the Applicant: The Applicant alleges that its application was timely filed. The Applicant concurs with the Department's recitation of the parties' communications between May 2012 and March 2013. However, the Applicant contends the Department's March 13, 2013 letter was the first time the Applicant "was advised of the legal, code-based, rationale for rejecting" the Revised Plan. The Applicant argues that, on appeal, the Board is required by §40.31.512 of the Uniform Development Code ("UDC") to balance the Department's decision "against the applicable section of the [Code]." As such, the Applicant determined it to be prudent, as well as its right, to wait for the Department to provide a code-based rationale for the decision that the Applicant's application was incomplete.

Contentions of the Department: The Department alleges that its decision regarding the Revised Plan application was final on June 1, 2012 and that all correspondence following this decision was made due to the Applicant's requests for clarification. According to the Department, the instant appeal of the March 13, 2013 letter fails because that letter was not a final decision but rather a recapitulation of the Department's previously expressed decision. The Department

further argues that the Revised Plan that was submitted in October 2012 was "no different in design" than the plan originally filed in May 2012. According to the Department, even if the Board considers the October 2012 application to have re-started the appeal clock, that appeal period would have ended on October 22, 2012.

Standard of Review: Pursuant to UDC § 40.31.512, the Board may grant an administrative appeal and reverse a decision of the Department where it finds that:

1. The decision-maker made an error in its interpretation of the applicable sections of [the UDC]; or

2. The decision-maker's findings and conclusions were not the result of an orderly and logical review of the evidence and the applicable provisions of [the UDC].

Administrative appeals are "heard based solely upon the materials (e.g., plans, documents, reports, studies drawings, and testimony) available to the official or body rendering the initial decision. Appeals shall not be used to consider new or altered plans." UDC § 40.31.511. The Board must base all its decisions solely upon the provisions of the UDC. UDC § 40.31.380.

Discussion: The Board is persuaded by the Department's analysis of the jurisdictional question. Under the UDC, an aggrieved party has 20 days to bring an appeal after a written decision is issued by the Department. The Board concludes that the Department is not required by either the State or the County Codes to specify a code section in a written decision denying the Applicant's application. In the instant case, the Department's final, written decision was issued on June 1, 2012. Under the UDC, the Applicant had until June 21, 2012 to appeal the Department's decision. The instant appeal application was not filed until March 28, 2013, some 9 months after the appeals period expired.

Conclusion: Based on the foregoing, a motion was made by Mr. Sheppard and seconded by Ms. Cahill to deny the appeal based on lack of jurisdiction due to the expiration of the statute of limitations for the appeal. After discussion on the motion, the Board voted unanimously to **DENY** the appeal. The vote on the motion to deny was **9-0-0** (*Yes: Anderson, Cahill, Killingsworth, McDowell, McGlinchey, Sheppard, Snowden, Wilson, Visvardis; No: none; Absent: none*). The applicant does not prevail.

REPORT OF COMMITTEES

No report.

REPORT OF GENERAL MANAGER

Jim Smith, Acting General Manager of the Department of Land Use reported on the Planning Board applications that were making their way through the review process and would be on future Planning Board Public Hearings in August, September, and October.

REPORT OF CHAIRMAN

Mr. Killingsworth welcomed Jim Smith as the new Acting General Manager and looked forward to working with him in the coming months. The Chair also indicated that he is hoping for some Department-lead training on the 2012 Comp Plan Update and the UDC alignment; he will be in contact with Jim Smith to establish a schedule.

OTHER BOARD MEMBER COMMENTS

None.

COMMENTS FROM THE PUBLIC

None.

ADJOURNMENT

On a motion by Mr. McDowell and seconded by Mr. Sheppard, the Board voted unanimously to adjourn the meeting at 10:45 a.m.

ATTEST:

James C. Smith, Jr.
Acting General Manager
Department of Land Use

Sandra Anderson for R.K
Richard Killingsworth
Chairman
Planning Board

All Present

PB Mens
McGlincey
McDowell
Visvardis
Cohill
Wilson

Snowden
Anderson
Killingsworth
Sheppard
Absent

Smith
Cortolano
Beck
Rogers

AGENDA
NEW CASTLE COUNTY
PLANNING BOARD BUSINESS MEETING
DEPARTMENT OF LAND USE - NEW CASTLE ROOM
87 READS WAY, NEW CASTLE, DELAWARE
July 16, 2013
9:00A.M.

ROLL CALL PB Attorney - Wil Davis

MINUTES

Approval of April 16, 2013 Meeting Minutes — McDowell - M, Visvardis - S — 6-2-1 (Snowden, McGlin)

Approval of June 18, 2013 Meeting Minutes — Sheppard - M, Cohill - S — 5-0-3-1 (1-Anderson, 1-Visvardis, 1-Killingsworth)

DEFERRALS –

BUSINESS McGlincey + Wilson

M-McDowell S-Cohill Sheppard recused for Anderson McGlincey 5-2-2 APPROVE

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OTHER BUSINESS

M - Sheppard move to deny appeal on the ground that it is out of time for the appeal

REPORT OF COMMITTEES

REPORT OF GENERAL MANAGER

REPORT OF CHAIRMAN

OTHER BOARD MEMBER COMMENTS S - Cohill

9 - 0

COMMENTS FROM THE PUBLIC

ADJOURNMENT M - McDow

S - Sheppard 10:45

New Castle County
DEPARTMENT OF LAND USE and PLANNING BOARD
Business Mtg. ~~Public Hearing~~ Register

July 16, 2013
(date)

IMPORTANT: PLEASE PRINT

~~Application No:~~

1. Jeff Seemans
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City State Zip

2. Craig Robert Lewis
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City State Zip

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Name
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4. Adam Taylor
Name
News Journal
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5. George Smiley
Name
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6. Jordyn Prisey - BERCA
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