

Rhodunda Williams & Kondraschow

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William J. Rhodunda, Jr.
Chandra J. Williams
Nicholas G. Kondraschow
Brian T. Murray*

**Of Counsel*

William J. Rhodunda, Jr.
Bill@rawlaw.com

Brandywine Plaza West
1521 Concord Pike, Ste 205
Wilmington, DE 19803
Telephone: (302) 576-2000
Facsimile: (302) 576-2004
EIN: 27-0943004

August 29, 2019

Lewes Planning Commission
Attn: Mr. Tom West
P.O. Box 227
Lewes, DE 19958

RE: Concerned Citizens' Fishers Cove Presentation to Lewes Planning Commission (August 21, 2019) Supplemental Information

Dear Members of the Lewes Planning Commission,

On behalf of myself and the twenty-seven households I represent on Rodney Avenue, Hoornkill Avenue, and Pilottown Road (the "Concerned Citizens"), we very much appreciated the opportunity to present and further elaborate upon our concerns, open questions, and issues relating to the major subdivision application for Fishers Cove at the August 21, 2019 public hearing. Please accept this letter as a supplement to our presentation in response to the Planning Commission allowing the record to remain open until August 31, 2019.¹ In particular, we appreciate this opportunity to respond to the Developer's rebuttal that was presented at the hearing on August 21st.

For the reasons set forth during our presentation, and as further expounded on below, the Concerned Citizens respectfully request the Planning Commission deny the proposed application for preliminary approval. Although the proposed Fishers Cove plan is at the Preliminary Consent stage of the approval process, the Developer has wholeheartedly failed to provide the Planning Commission with sufficient information necessary to evaluate and render a decision on the proposed plan under the criteria required by Section 170-19(E) of the City of Lewes Code.

¹ For purposes of clarification, the concerns and issues that I have raised in this letter are equally applicable to the related minor subdivision application submitted by Burke & Rutecki, LLC (the "Developer") for parcels TP 335-4.14-103.00 and TP 335-4.14-104.00 (the "Minor Subdivision Application").

In fact, by introducing a brand-new conceptual sketch of the plan at the August 21st hearing, the Developer all but conceded that the current iteration of the plan was not capable of managing storm water on the site. Rather than providing the Planning Commission and the Public with basic information showing that their stormwater management plan is remotely functional on this parcel, they have radically changed the design at least four times, have stubbornly refused to seek advice and counsel from the Sussex Conservation District (“SCD”), and have asked the Planning Commission to grant preliminary consent based upon the Developer’s unsubstantiated representation that its engineers might eventually find a concept that works. Such blind faith reliance is certainly not the standard of review enumerated in Section 170-19(E).

There is no doubt that this is a very difficult piece of land to develop, the fact of which was easily discoverable with even a modicum of due diligence on the part of the Developer. The land is almost entirely in the 100 year flood plain, contains wetlands, has a high water table, has poor drainage conditions, has experienced documented regular significant flooding events, and was the subject parcel of a comparable major subdivision previously denied by the City Council. Nevertheless, the burden is on the Developer to overcome these barriers to development and prove that the proposed plan satisfies the threshold requirements for preliminary approval in Section 170-19(E). In this instance, the record suggests that the Developer has not satisfied this burden.

I. THE PLAN

The Concerned Citizen’s response to the Developer’s rebuttal can be boiled down to the following main points:

- A) **Introduction of New and Fundamentally Different Storm Water Management Plan:**
The storm water management plan is a moving target, and there remains great uncertainty with how the State of Delaware, Sussex County, and the City of Lewes storm water regulations can be met. The most disconcerting part of the Developer’s presentation is that, despite several prior revisions to the proposed storm water plan, a fundamentally different plan – one calling for the elimination of the storm water basins and diversion of water underground to the Lewes Canal – was introduced for the first time at the August 21st hearing. This new plan was not provided in advance to the Planning Commission, City Planning staff, or the City’s Engineer for review, comment, and recommendations in their Reports provided to the Commission. Moreover, as the City’s engineer noted at the Public Hearing, this new plan could implicate homes on the Lewes Beach side of the Canal that are already environmentally sensitive and subject to flooding. These citizens in particular have not had any opportunity to investigate, let alone testify to the Planning Commission, about the impact of the Developer’s newly proposed plan to their properties. When pressed, and facing the prospect of resubmitting the entire plan for additional review and comment, the Developer’s counsel stated that the Commission should consider the old plan, and that the new plan was only included to show ways to

improve the old plan. Aside from the Developer's engineer's admission that infiltration in stormwater ponds is not possible, the concern for the Concerned Citizens is that the new plan is a completely different concept for storm water management, the flooding and environmental implications of which have yet to be considered by the Public and the Planning Commission. Notably, the Developer's engineers admitted multiple times that the storm water plan needed a lot of review and study. In light of the new conceptual drawings, there is presently no clear path ahead for managing the water on the proposed site.

B) Failure to Satisfy Requirements of Section 170-19(E): The Developer wants the Commission to disregard the provisions of Section 170-19(E) of the City of Lewes Code that explicitly requires the Planning Commission to consider the following at the Preliminary Consent stage of the process:

- i) Section 170- 19(E)(3) specifically requires the Planning Commission to consider and require, "minimal use of wetlands and flood plains."
- ii) Section 170-19(E)(11) specifically requires the Planning Commission to consider and require, "Minimization of erosion, minimization of changes in groundwater levels, minimization of increased rates of runoff, minimization of potential for flooding and design of drainage so that groundwater recharge is maximized."

Instead of providing the Commission with sufficient plans and information to consider these code provisions, the Developer simply presented, "Proposed Conditions to Preliminary Consent." The pertinent Proposed Condition indicates that the Developer will meet the required State and City of Lewes requirements at some later time. The storm water and flood plain issues are undisputedly so serious at this property that the Developer should be required to submit a plan with some possibility of conformance with State and City requirements in order to proceed beyond the Preliminary Consent stage. The Developer's ever-changing storm water plans are the best evidence that there is no confidence in any plan submitted to date. The Plan presented at the meeting was a major change from the last plan submitted, and the City did not have an opportunity to review prior to the meeting. The Concerned Citizens fully appreciate that development plans are subject to various agency comments and revisions if preliminary approval is granted, but the Developer's inability to even establish a feasible storm water management concept after multiple bites of the apple suggests that the Developer cannot satisfy the Section 170-19(E)(3) and (E)(11) requirements.

C) Failure to Seek Guidance from SCD: The Developer ignored the City Planning Staff's recommendation regarding the exact issue before the Planning Commission: compliance with Section 170-19(E). Page 9 of the June 4, 2019 Staff Report includes the following:

- i) “Given the significance of the drainage concerns and the multiple attempts to redesign, the Applicant should consult with the Sussex Conservation District to find the most suitable approach.”
- ii) “The Applicant should share the preliminary results from the Sussex Conservation District with the Planning Commission, so the Planning Commission can determine whether the plan complies with Section 170-19(E).”

The Developer provided insufficient information to the Planning Commission to determine if the Section 170-19(E) requirements have been met, and never even filed the plan for review with the Sussex Conservation District. In fact, when questioned as to why the Developer has been so resistant to meeting and collaborating with SCD prior to a decision on preliminary approval, they responded “because legally we do not have to.” Given that the Developer must eventually obtain SCD approval prior to final approval of this plan, the reluctance to confer with SCD at this stage is puzzling and shows a callous disregard for the serious flooding issues on this site.

D) **Feasibility under the Building Code.** The Developer is asking the Planning Commission to disregard pertinent provisions of the City of Lewes Building Code. Section 197-73 of the Building Code requires:

- i) Maintain natural drainage.
- ii) Minimize impact on adjacent properties.
- iii) Provide that flood storage and conveyance functions of the flood plain are maintained.
- iv) Minimize impact of development on the natural and beneficial functions of the floodplain.
- v) Prevent floodplain uses that are either hazardous or environmentally incompatible.

These concepts are certainly intertwined with the concepts in Section 170-19(E). In light of issues surrounding the severe environmental constraints on the property, the extent and location of fill, the use of a bulkhead, and uncertainty of the ever-changing storm water/drainage plans provided to date, it would be remiss not to consider the implications of related provisions found in the Building Code.

E) **The Flood Study.** The Developer’s engineers stated multiple times that the Developer was going to follow the recommendations of the Flood Study. Furthermore, the Developer’s engineers acknowledged that under State and City of Lewes laws, this project could not adversely impact the neighboring properties. They went even further to state that the conditions for the neighbors could even improve. The issue for the Developer is that the Flood Study specifically indicates that there will be an adverse impact on neighboring properties as a result of the development of Fishers Cove. No

plans have been submitted to date to provide any confidence that the negative impact caused by the development of Fishers Cove will be mitigated.

II. ACCESS TO PROPOSED DEVELOPMENT

The Developer's application proposes access to Fishers Cove through an extension of Rodney Avenue. This is not the first time a developer has applied to use Rodney Avenue as access for a proposed major subdivision on this property. Specifically, in 1989, the City Council considered and rejected the Planning Commission's recommendation of preliminary approval for a proposed development on the property, using Rodney Avenue as the access point for the planned subdivision.

The City unanimously denied the Planning Commission's recommendation based upon the condition and size of the road, the Rodney Avenue residents' concerns, and the availability of other possible access points (including access via land adjacent to Pilottown Road). In fact, the same land adjacent to Pilottown Road referenced by the Planning Commission in 1989 is now part of the proposed Fishers Cove plan. The Developer knew or should have known about the Council's 1989 denial of access to a planned community through Rodney Avenue prior to purchasing the subject parcels. My clients respectfully request that the Planning Commission consider and adhere to the sound precedent established by the Lewes City Council in 1989.

The Developer has direct access to Pilottown Road.² If the storm water/drainage/flooding issues can be resolved, the Developer should be required to utilize that access instead of Rodney Avenue. The Developer is already proposing an access to Pilottown Road for emergency use. That access should be required as the access for the project.

III. CONCLUSION

Once again I want to reiterate my clients' appreciation for the Planning Commissions careful consideration of the issues we have raised. Many of my clients have been long term residents of Lewes and are simply seeking to assure that their properties will not be adversely affected by the proposed development.

² The Developer's counsel argued that this is a landlocked parcel, and suggested that Developer's ownership of the connecting parcel abutting Pilottown Road (which was previously part of the Fishers Cove plan) had no bearing on the issue of access to Fishers Cove. Our concern is that the proposed Minor Subdivision Application and resubmission of the new Fishers Cove plan was a veiled attempt by the Developer to completely foreclose the possibility of using Pilottown Road as the main access point to the proposed Fishers Cove Development. It is disingenuous and inequitable for the Developer to argue the site is landlocked but for access to Rodney Avenue, while artificially and intentionally cutting off the option of access via Pilottown Road.

Lewes Planning Commission
August 29, 2019
Page | 6

Since the Developer has failed to provide information to allow consideration of the provisions of Section 170-19(E), we respectfully request that the Planning Commission deny the proposed plan. Please do not hesitate to contact me if you have any questions.

Very truly yours,



William J. Rhodunda, Jr.

cc: Concerned Citizens
Shawn P. Tucker, Esq.