

RHODUNDA WILLIAMS & KONDRASCHOW

WWW.RAWLAW.COM

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

October 11, 2021

The Honorable Theodore W. Becker
Mayor of the City of Lewes
The City Council of the City of Lewes
114 E. Third Street
P.O. Box 227
Lewes, DE 19958

Re: Fishers Cove Development

Dear Mayor Becker and City Council:

I write on behalf of the Concerned Citizens of Rodney Avenue, Hoornkill Avenue and Friends (the "Concerned Citizens") regarding the City of Lewes Planning Commission's denial of the application of Burke & Rutecki, LLC (the "Applicant") for the major subdivision known as Fishers Cove (the "Fishers Cove Development"). Below I summarize the Concerned Citizens opposition to the Fishers Cove Development and the reasons for the Planning Commission's denial of the application for the Fishers Cove Development.

I. Failure to Comply with the City of Lewes Comprehensive Plan, Floodplain Zoning Ordinance and Land Development and Subdivision Ordinance

The Planning Commission denied the Applicant's application for the Fishers Cove Development because the Applicant failed to demonstrate compliance with the City of Lewes Comprehensive Plan,¹ Floodplain Zoning Ordinance and Land Development and Subdivision Ordinance. The Fishers Cove Development is proposed to be on land that is very difficult to develop: it is almost entirely in a 100-year flood plain, contains wetlands, has a high water table, has poor drainage conditions and has experienced documented regular significant flooding events. A similar proposal for development on the land was denied in 1989. The Applicant's application is not sufficient for development on the land and fails to comply with the City of Lewes Comprehensive Plan, Floodplain Zoning Ordinance and Land Development and Subdivision Ordinance.

¹ The City of Lewes Comprehensive Plan states that: "[n]ew floodplain development may not aggravate existing flood problems or increase damage to other properties." Comprehensive Plan, page 22.

The land on which the Applicant proposes to build the Fishers Cove Development has been designated by the Federal Emergency Management Agency (FEMA) as a special flood hazard area. The City of Lewes adopted Section 197-73 to meet the requirements of the National Flood Insurance Program for such special flood hazard areas. *See* Section 197-73(A)(1)(b).

Section 197-73(A)(2) provides in relevant part:

Statement of purpose. It is the purpose of these regulations to promote the public health, safety and general welfare, and to:

(d) Maintain natural drainage;

(j) Minimize the impact of development on adjacent properties within and near flood-prone areas;

(k) Provide that the flood storage and conveyance functions of the floodplain are maintained;

(l) Minimize the impact of development on the natural and beneficial functions of the floodplain;

(m) Prevent floodplain uses that are either hazardous or environmentally incompatible

The City of Lewes Floodplain Zoning Ordinance Sections 197-73(A)(6)(a) and (b) provide that: “In the interpretation and application of these regulations, **all provisions shall be considered as minimum requirements and all provisions shall be liberally construed in favor of the governing body**” (here, the City of Lewes).

Instead of attempting to meet these requirements, the Applicant has stated that it cannot, and will not, meet such requirements because they are just words with no meaning or are mere “goals” or “purposes” that they don’t have to meet. However, in addition to the Ordinances’ own language (“all provisions shall be considered as minimum requirements and all provisions shall be liberally construed in favor of the governing body”), a decision of the Superior Court of the State of Delaware, affirmed by the Supreme Court of the State of Delaware, has already determined that such requirements are minimum requirements that the Applicant must meet. *See Pizzadili Partners, LLC v. Kent County Bd. Of Adjustment et al.*, 2016 WL 4502005 (Del. Super. 2016), *aff’d LTR Properties, LLC*, 157 A.3d 757 (Del. Supr. 2017). In the Superior Court’s own language, such statements of purpose “**are to be considered as minimum requirements**” and “**liberally construed to protect the safety, health and welfare of the citizens.**”² *Id.* at *4.

² In addition, the City of Lewes Zoning Ordinance Section 170-19(E)(1) provides that the Planning Commission’s review shall include compliance with the provisions of the Floodplain Zoning Ordinance and the City of Lewes Comprehensive Plan, into the Land Development and Subdivision Ordinance, provides: “The purpose of this chapter is to assure that sites are suitable for all development purposes, including residential, commercial, industrial, institutional and recreational, to assure that these sites are properly prepared for human habitation and to provide for the harmonious development of the City, for the coordination of existing streets with proposed streets, parks or other features of the City plan of streets and alleys, for adequate open

II. Fill³

With respect to special flood hazard areas such as the land on which the Applicant proposes to build the Fishers Cove Development, Section 197-73(D)(5) provides: “[d]isposal of fill, including but not limited to rubble, construction debris, woody debris, and trash, shall not be permitted in special flood hazard areas” and “[f]ill shall not be permitted to be placed for the purpose of supporting a building or structure.”

Further, Section 197-73(E)(3) – “Protection of flood-carrying capacity” – which deals with development activity that would affect the flood-carrying capacity of the floodplain, provides:⁴

Within any floodway area designated on the Flood Insurance Rate Map, no encroachments, including fill, new construction, substantial improvements, or other development shall be permitted unless it has been demonstrated through hydrologic and hydraulic engineering analysis that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge.

The Applicant’s claim that the Fishers Cove Development will have “net zero fill” is misleading. It does not mean there will be no fill in the floodplain. Soil is being removed from the floodplain to create holding ponds. That soil is then being used to construct the roads and elevate the lots in the Fishers Cove Development. In certain places, the road will require 5 feet of fill. Certain lots will require 3.5 feet of fill. The homes built on the lots have to achieve finish grade and floor elevations set forth in FEMA Compliance Table, Sheet 4. This varies, but in

areas for traffic, recreation, light and air and for proper distribution of population, **thereby creating conditions favorable to the health, safety and general welfare of the City of Lewes, as set forth within the City’s Comprehensive Plan** and consistent with federal and state initiatives concerning the reasonable and prudent development applicable to municipalities of the size and character of Lewes.” Section 170-2 (emphasis added).

Section 197-73(A)(1)(b) of the Lewes Code provides that, “all development, new construction, and substantial improvement, as defined herein, are to be compliant with the floodplain management regulations in effect at the time of construction, and all development, new construction, and substantial improvements subsequent to the effective date of these regulations shall be compliant with these regulations and the flood load and flood-resistant construction provisions of the Building Code Floodplains.”

³ Section 197-106 defines fill as “[s]and, gravel, earth, or other materials of any composition whatsoever placed or deposited by humans usually to form an embankment or raise the elevation of the land surface.”

⁴ The 2/7/2019 Staff Review stated that the plan for the Fishers Cove Development should address Section 197-73(E)(3).

some cases is 4 ½ feet. And the Applicant has not established “through hydrologic and hydraulic engineering analysis that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge” and does not appear to have performed geotechnical testing to validate that appropriate safe soil bearing capacity (the original soils report from the Applicant’s Engineer’s Report, dated 12/17/18, states that most of the excavated site soil is “somewhat limited” for local roads and streets).

III. Retaining Wall

The Applicant proposes to build over 500 feet of retaining wall around the wetlands. The presence of retaining walls, particularly 500 feet of retaining walls, demonstrates that the Fishers Cove Development will not “maintain natural drainage,” “provide that the flood storage and conveyance functions of the floodplain are maintained,” and “minimize the impact of development on the natural and beneficial functions of the floodplain.” Retaining walls of this size in the floodplain **will** divert the natural drainage and conveyance around the Fishers Cove Development and to adjacent properties.

IV. Engineers

The Applicant initially indicated to the Planning Commission that it would comply with AECOM’s recommendations. Then, at the July 13, 2021 hearing, the Applicant stated that AECOM’s recommendations were not “legal standards” and it didn’t have to comply with them.

In any event, while it does not appear that AECOM has provided the City of Lewes with a final report, its draft report is concerning: (1) it shows adjoining areas with increased flooding caused by the Fishers Cove Development, (2) it does **not** show where diverted water from the Fishers Cove Development is going, (3) it does **not** explain what models were run through its analysis, including models with increased impervious surfaces, (4) the modeling AECOM did run “demonstrated that the lagoon area cannot absorb additional runoff without changing its flooding patterns; consequently, cumulative effects from additional development may result in more substantial increases to flood levels in the lagoon which will affect any surrounding land that drains into it,” (5) the modeling AECOM did run made assumptions that are not necessarily true: “the outfall to the lagoon from Fisher’s Cove was assumed to have a flap gate to block coastal surge from the drainage pipe. Without a flap gate, coastal surge may flood storm water ponds, greatly reducing their capacity for capturing runoff. Storm drain controls like flap gates may also be necessary to control timing of development discharges and ensure they aren’t releasing neighborhood runoff at the same time the coastal storm surge is peaking.”

AECOM made the following recommendations: (1) include coastal surge in the design of future development storm water systems, (2) confirm grading and storm water design in the Fishers Cove Development can accommodate runoff from homes along Rodney Avenue as efficiently as current conditions, and (3) include effects of water table when determining capacity of storm water ponds. There has been no demonstration that these recommendations were followed.

While GMB, the City of Lewes' engineer, reviewed the Applicant's plan, they **did not** reference an AECOM final report and they **did not** find that the Applicant's plan complied with the City of Lewes Comprehensive Plan or Floodplain Zoning Ordinance.

V. Rodney Avenue

Initially the Applicant owned both the Fisher House parcel and the Fishers Cove Development parcel. The Fisher House parcel could have provided the Fishers Cove Development access to Pilottown Road. Instead, the Applicant split off the Fisher House parcel in a minor subdivision approved in April 2020 and landlocked itself, in an apparent plan to force the City of Lewes to let it use Rodney Avenue for access. The Applicant claims that it did not landlock itself and that it had no legal access to Pilottown Road through the Fisher House parcel (since it would have had to seek a variance) – however, the Applicant's plan to use Rodney Avenue for access requires a variance.⁵

There are numerous problems with the Applicant using Rodney Avenue for access. The Applicant is seeking substantial widening of Rodney Avenue from the existing 16-18 feet to 24-26 feet, with a 50 foot right of way which includes swales. The increased width and swales would grossly encroach on current property owners' property and access, and every single existing driveway on Rodney Avenue would require an accommodation. The increased width would also increase runoff at both ends of Rodney Avenue. Finally, several Rodney Avenue residents have City of Lewes-approved geothermal loops in the right of way.

The Applicant has also seeks to use Rodney Avenue as a construction entrance (when it could have used the Fisher House parcel as a construction entrance), which will subject the current residents of Rodney Avenue to months and possibly years of construction traffic, heavy machinery and truckloads of fill being hauled into the development, with all the accompanied disruptions, noise pollution, dust and damage to the streets.

VI. Conclusion

For the foregoing reasons and, in particular, the Applicant's failure to demonstrate compliance with the City of Lewes Comprehensive Plan, Floodplain Zoning Ordinance and Land Development and Subdivision Ordinance, the Concerned Citizens respectfully request that Your Honor and the City Council also deny the Applicant's application for the Fishers Cove Development.

Respectfully submitted,

/s/ William J. Rhodunda, Jr.

William J. Rhodunda, Jr.

⁵ On that point, the Concerned Citizens dispute that the Applicant is entitled to an exception to these requirements pursuant to Section 170-27(E)(2) or that the Applicant can otherwise demonstrate the exceptional practical difficulty necessary for a variance or that this isn't a self-created hardship pursuant to Section 197-92.