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February 28, 2020

RECEIVED
FEB 28 2020
CITY OF LEWES

VIA E-MAIL AND HAND DELIVERY

The Honorable Theodore W. Becker
Mayor of the City of Lewes
114 Third Street
Lewes, DE 19958

Re: **Fishers Cove - Burke & Rutecki, LLC**
Preliminary Consent

Dear Mayor Becker and Council Members:

Our firm represents Burke and Rutecki, LLC (the "Applicant") in connection with its major subdivision application for the Fishers Cove subdivision (the "Major Application") which was presented at a noticed public hearing on June 13, 2019.[1] The hearing was continued until August 21, 2019 when the applicant responded to further comments by the City with more expert testimony.[2] The Lewes Planning Commission's (the "Planning Commission's") Preliminary Consent denial recommendation (the "Recommendation")[3] on the Fisher Cove major subdivision is now before the Mayor and City Council pursuant to § 170-19(F)(1) of the City of Lewes Code of Ordinances (the "City Code"), which states in part as follows:

> *The Mayor and City Council shall consider the Planning Commission's report formally rejecting the initial application within a reasonable time, and may either accept it, reject it, or return it to the Planning*

[1] Applicant's Power Point Presentation as Ex. A.
[2] Alternative Storm Water Option Plan as Ex. B.
[3] The Recommendation is attached hereto as Ex. C.

> *Commission for further consideration.*[4] *Should the Mayor and City Council disagree with the Planning Commission's report rejecting the initial application, the Mayor and City Council may reject the Planning Commission's report and instead grant the applicant "preliminary consent."*

The Mayor and City Council have left the record open until February 28th, 2020, for the Applicant and interested parties to submit argument or comments. Based on comments made by the City's counsel, these submissions are limited to facts established by the public record before the Planning Commission. Although the Applicant requested to be allowed to make a presentation before Mayor and City Council, that request was denied.

The Mayor and City Council should grant Preliminary Consent, or reject the Planning Commission's recommendation, for the following reasons:

I. The Planning Commission's three reasons for rejection of the Major Application are contrary to the record, and their application of those standards is arbitrary and capricious.

The record below confirms that the Planning Commission erred when it recommended denial of the Major Application. Specifically, the Planning Commission cites, as the primary basis for its rejection, "two major flaws that

[4] The applicant respectfully ask that the Mayor and City Council make a decision on the Major Application and decline to send the Major Application back to the Planning Commission, which seemed determined to overburden the Applicant contrary to the Planning Commission's precedent, the City Code and established Delaware subdivision law (described more fully in Section III herein).

cannot be resolved by simple conditions": (1) storm water management, and (2) access.[5] However, in reaching this erroneous conclusion, the Planning Commission failed to follow the law as enacted by City Council, and imposed new standards outside of the City Code. Having applied these erroneous standards, the Planning Commission appears to have orchestrated its end result. Accordingly, the Recommendation should be rejected, as it is founded upon incorrect legal standards.

Indeed, zoning laws, regulations and codes exist so that property owners can know what they can and cannot do with their properties. The uniform application of relevant laws, rules and regulations is an essential element of property rights and land use. As the Delaware Superior Court states in *East Lake Partners v. City of Dover*:

> *When people purchase land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in the ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby land owners and residents. To hold otherwise would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements of the use of land not specified elsewhere anywhere in the ordinance. The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zone ordinance.*

655 A.2d 821, 826 (Del. Super. Ct. 1994). Thus, the Planning Commission was not free to invent new standards at its "whim or caprice." If a zoning application, such as the current Major Application, complies with the City Code, it must be approved.

(a) **Storm Water Management.** The Planning Commission erroneously claimed in its Recommendation that "[t]he applicant has not reasonably demonstrated that the proposed SWM [Storm Water Management] plan could

[5] The Planning Commission also raised various ancillary matters as well, which are addressed *infra*.

actually be built and function to not increase the flood hazards to adjacent properties."[6]

(1) This statement is contrary to both law and fact. First, a demonstration that a proposed SWM plan "could actually be built" is not required at the preliminary consent stage. Rather, City Code § 170-19(A)(2) requires a party applying for preliminary consent to submit a "*conceptual* plat plan" which satisfies the Planning Commission's consideration of the twenty-two factors listed under § 170-19(E); a design including the "tentative location and size of proposed storm sewers, drainage ditches, watercourses or stormwater management system"[7] is not required until after the applicant has received preliminary consent and "arrange[d] for further conferences with the Board of Public Works and City Engineer regarding preparation and submission of a complete major subdivision application." City Code § 170-20(A)(1).

The Planning Commission's negative Recommendation based on "not increas[ing] flood hazards to adjacent properties" is not the standard for storm water management under the City Code. City Code § 170-19(E)(11) requires the Planning Commission to consider "minimization of potential for flooding" and "minimal use of wetlands and floodplains," and City Code § 197-73(A)(2)(j) requires new development to "minimize the impact of development on adjacent properties within and near flood-prone areas."[8] Finally, the City Code requires developments to be "constructed and maintained so that adjacent properties are not unreasonably burdened with surface waters as a result of such development."[9] Thus, the City Code emphasizes the importance of minimizing flood potential, and not "unreasonably" burdening adjacent properties with surface water; it does not require the Applicant to prove that the Major Application will not increase flood hazards to adjacent properties. Thus, the Planning Commission's invented "standard" is emblematic of its persistent attempts to move the goal posts on this application, and, as such, is legally flawed.

The Planning Commission's statement that the Applicant has failed to meet its erroneous standard is wrong as a matter of fact. Mr. Dev Sitaram, P.E., has testified that each of the Major Application's proposed stormwater management systems—the system presented in March 2019, and the system presented after the

[6] Ex. C at 1.
[7] City Code § 170-20(A)(2)(q).
[8] *See also* City Code § 197-73(D)(2)(a) ("All subdivision and development proposals shall be consistent with the need to minimize flood damage[.]")
[9] City Code § 197-77(A)(1).

issuance of the flood study—could be built, and would function to not increase the flood hazards to adjacent properties. The latter system would actually function to improve drainage on adjacent properties, as confirmed by Mr. Jeff Bross, P.E. "[A]s was testified at the August Planning Commission meeting, we intend to explore opportunities that, as part of the final engineering design, will improve drainage and thereby reduce flooding on the adjacent Rodney Avenue properties."[10]

The Recommendation asserts that the Major Application failed to address: (1) the high ground water table with respect to storm water management basin design and other Sussex Conservation District ("SCD") and Delaware Department of Natural Resources and Environmental Control ("DNREC") requirements; (2) the City-commissioned flood study showing that the development could potentially increase flooding for adjacent properties; and (3) that the Applicant's "'conceptual' design changes . . . would require a wholesale redesign of the March application and invalidate all reviews" done to date. This legal standard is not found in the law, but, again, was invented by the Planning Commission. However, while these assertions are premised on a standard not found in the City Code, it is nonetheless clear in the record that the Applicant has provided evidence on each of these alleged omissions.

The Planning Commission's assertion that the Major Application's storm water management basin design is inadequate has no merit. The Applicant's engineer, in his testimony and via exhibit submitted to the Planning Commission for its consideration, has confirmed that its storm water management design does, in fact, comply with all applicable State of Delaware and SCD standards.[11] The engineer has further confirmed that "the Major Application will result in an engineered design for Fishers Cove that will provide positive drainage via swales and storm drains and not cause retention of surface water on neighboring properties."[12] Further, concerns regarding the "high ground water table" were not raised by the City Engineer in its preliminary consent review. However, Mr. Dev Sitaram, P.E., testified to the adequacy of the storm water management system in regard to the high ground water table at the August 21, 2019 Planning Commission hearing. Due to intense skipping on the audio file, we were not able to prepare a full transcript of that hearing; however, in his testimony notes for that hearing. Mr. Sitaram had prepared the following statement:

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[10] Ex. D at 2,
[11] *Id* at 6.
[12] *Id.*

> *Our initial approach to stormwater management was to provide for infiltration into the ground. That would be SCD's preferred option. A soils scientist was engaged to determine the feasibility of infiltration on this property and to determine the seasonal high-water table. The results of the investigation indicate that the ground is not suitable for infiltration as the rates are below acceptable levels. So, our stormwater management approach that we presented on our Concept Plan is to provide for rain gardens and bio-retentions facilities. These facilities will have to maintain a separation of approximately 3 feet to the groundwater elevation at the site, which based on soils test is an average of elevation 3.0. Therefore, the stormwater facilities that are depicted on our Concept Plan are certainly practical and can be designed considering the elevation of the water table on this site.*

Mr. Sitaram's testimony confirms that the Application (1) took into account the preferences of SCD; (2) hired a soils scientist to evaluate infiltration on the site and the seasonal high-water table; and (3) determined the most feasible and effective storm water management system on the basis of these findings. Therefore, City Council should give no weight to the Recommendation's incorrect assertion that the Applicant has failed to consider the ground water table in its storm water management design.

The Recommendation asserts vaguely that the Major Application has failed to address SCD and DNREC requirements. It is unclear from the Recommendation what specific requirements have not been addressed, but it is important to note that approvals from SCD and DNREC are not required at this stage of the land use process, nor are they traditionally sought during the preliminary consent process. Indeed, the record confirms this: the City's own planning report specifically noted that full review was inappropriate at the preliminary consent stage, stating "[t]hose determinations ultimately require submittal of detailed grading and system designs, and review/approval by the Sussex County Conservation District or an authorized engineer acting in that capacity, **an evaluation currently required as part on the Final Plan** and Improvements construction phase of the review process."[13] (emphasis added).

[13] Ex. F at 8-9

Similarly, the City Engineer's Report noted that its comments to the Applicant "will be addressed during the **Council Approval** phase of the project."[14] Thus, the Recommendation unfairly seeks to impose late-stage review on an application awaiting only *preliminary* approval. If, at the time the Applicant seeks final approval, SCD, DNREC and FEMA approvals have not been obtained and the Major Application does not comply with their respective requirements, it would, at that time, be appropriate to deny the Major Application. Thus, it is inappropriate to deny the Major Application based on the failure to comply with SCD and DNREC requirement when: (a) review, compliance and approval does not occur at this stage of the process; and (b) the Planning Commission does not cite or even identify the specific alleged deficiencies to give the Applicant an opportunity to address them.

(2) Second, the Planning Commission claims that "[t]he City-commissioned [f]lood [s]tudy shows that the development, if it could be built, would increase flooding for the adjacent properties." This statement is a mischaracterization of the findings of the flood study, and again seeks to impose an unfair and legally baseless standard of review on the Applicant.

As a threshold matter, compliance with the flood study is neither contemplated nor required by the City Code, and, thus, cannot serve as a legal basis for rejection of the Major Application.[15] Further, the flood study is not signed and sealed by a professional engineer. Moreover, no prior application has been subjected to a similar requirement. And it is also worthy of note that the flood study was not even available at the time of the Major Application's submission: the Applicant presented the Major Application to the Planning Commission at the Planning Commission's June 2019 hearing. The flood study was not issued until *after* the June hearing.

Additionally, the Planning Commission is factually incorrect in its assertion that the flood study, which is not law, shows that the Major Application would increase flooding for the adjacent properties. In fact, the flood study found that "[i]n each of the Fisher's Cove model scenarios, the maximum flood depth was not substantially affected."[16] The flood study premised the storm water design used in

[14] Ex. G at 1 (emphasis added).
[15] Ex. H. The flood study tacitly acknowledges that a finalized storm water management system plan is not required at the preliminary consent stage: "Two of the developments are still in the preliminary stages of design and consequently, do not yet have detailed specifications on the storm water systems. These developments are Fisher's Cove and the Lewes Waterfront Preserve."
[16] *Id* at 31.

its modelling of the Major Application on "[a]ssumptions."[17] Accordingly, the flood study is neither a reliable representation of the impact of the Major Application's storm water management design, nor indicative of substantial flooding resulting from the Major Application.

And although compliance with the flood study is, again, not required by the City Code, the Applicant willingly addressed the flood study in good faith, and at great cost to itself. In response to the study, the Applicant hired an expert flood engineer, Mr. Jeff Bross, P.E. of Duffield Associates, to prepare a supplemental concept plan in conjunction with the Applicant's site engineer, Mr. Dev Sitaram, P.E. of Karins and Associates, illustrating additional storm water management options to quell any concern regarding flooding. Although Mr. Jeff Bross, P.E. asserts that "the Major Application presented at the Planning Commission's June public hearing complies with all applicable chapters and provisions of the City of Lewes Code of Ordinances,"[18], the supplemental concept plan was designed to go above and beyond the call of the City Code and not only not exacerbate flooding, but, in fact, to "improve area flooding and drainage."[19] The supplemental concept plan proposed the use of either a culvert improvement or a canal outfall option to accomplish this—at no small cost to the Applicant. Yet the Recommendation unfairly penalizes the Applicant for attempting to improve flooding conditions in the area beyond those required by law, rather than resting on the Applicant's compliant Application, which Mr. Jeff Bross, P.E. testified that, based on his review of the flood report, "w[ould] not have a measureable adverse impact on area waterways."[20] Accordingly, the Planning Commission's assertion that the Applicant failed to account for the flood study is false. Moreover, the Applicant was not legally required to address the flood study. Having spent thousands of dollars to do so, the Planning Commission has ignored the Applicant's thorough response and unfairly imposed an arbitrary recommendation.

The most concerning aspect of the Planning Commission's newfound desire to rely on a flood study for the Major Application is that the standard for compliance is nebulous at best and impossible for the Applicant to comply with in full. The City Code sets forth specific guidelines for storm water management and flooding, not the flood study; indeed, these specifically codified sections set the bar for approval. Yet, notwithstanding these codified standards, the Planning Commission has sought to inject uncertainty into the Major Application by

[17] *Id* at 20.
[18] Ex. D at 1.
[19] *Id* at 6 and Ex. B..
[20] *Id* at 7.

insisting the Applicant address issues in the flood study, and further stating that the Major Application should be denied because the flood study shows, in the eyes of the Planning Commission, the potential for increased flooding to adjacent properties. The lack of guidance on what would be acceptable to the Planning Commission in light of the flood study is exactly the concern identified by the Superior Court in *East Lake Partners*, as the Applicant has clearly been subjected to the "whim or caprice of the [Planning] Commission" because the Planning Commission is attempting to "impose ad hoc requirements of the use of land not specified elsewhere anywhere in the ordinance." *East Lake Partners*, 655 A.2d at 826.

(3) Third, the Recommendation alleges that the supplemental concept plan would invalidate reviews of the Major Application made to date. This assertion misconstrues the purpose of the concept plan, which was intended to supplement, rather than supplant, the Major Application. This was made clear by me on the record before the Planning Commission. The supplemental concept plan merely "identifie[s] additional potential options . . . which could be made during the final approval process" to improve flooding conditions at the site. Ex. F at 4–5. The Major Application stands on its own merits; as cited above, the City Engineer confirmed that the Major Application's storm water management design was sufficient for preliminary consent review. *See* Ex. G. The Recommendation's reference to nebulous "reviews" which must allegedly be revisited in light of the supplemental concept plan finds no support in the facts. Of the three reports made on the Major Application, only the City Engineer and City Planning reports address storm water management in detail. The City Engineer's report found the Major Application sufficient. *See* Ex. G. It is unfathomable to think that the mere presentation of potential storm water management options in response to concerns raised by the public and the flood study would somehow invalidate all reviews to date. Clearly, no good deed goes unpunished by the Planning Commission. All of the engineers agree: the Major Application, as submitted, complies with the Code and, as the City's engineer stated, "[a]ll building lots (1-18) are suitable for subdivision as requested." Ex. G at 2. In sum, the Planning Commission's Recommendation is fundamentally flawed because it does not rely upon the correct legal standard.

(b) **Access**. The Recommendation next proposes that widening Rodney Avenue to permit access to the Fishers Cove lots "will impact the property values of the ~16 homes located on it by greatly reducing the house setbacks, reducing off-street parking and increas[ing] traffic." The Recommendation argues that an access point to Pilottown Road should instead be constructed on the Fisher House

lot, despite the illegality of such an entrance.[21] It should be noted that this argument is now moot, as the Planning Commission has recommended approval of the Minor Application without an illegal access point on the Fisher House lot.

(1) First, it is inaccurate that any proposed widening of Rodney Avenue would reduce setbacks or off-street parking. As discussed below, Rodney Avenue exists in a fifty (50) foot wide easement. Any proposed widening or improvements to Rodney Avenue would all be conducted in the already existing easement area, which, by its very nature, must be kept clear of improvements. The existing setbacks on the properties on Rodney will not be impacted as the status quo is maintained with respect to the easement area. As is clear, many of the residents on Rodney Avenue have completely disregarded the easement area and constructed improvements in the easement area. Notwithstanding these encroachments, the Planning Commission appears to recommend protecting the Rodney Avenue residents encroaching in the easement over protecting the applicant's rights to access its landlocked property. Ultimately the City and landowners can agree to a suitable improvement on Rodney Avenue that is both legal and desirable.

Ironically, in another portion of the City, the City of Lewes has undertaken surveys of the rights of way located in Lewes Beach to determine what encroachments exist by residents in order to address concerns raised by the public with the goal of protecting the rights of ways. It defies logic that the Planning Commission favors maintaining the status quo on Rodney Avenue and the continued encroachments on Rodney Avenue by the neighboring residents when, in a different part of the City, the City of Lewes is actively seeking to remedy such encroachments. Depriving my client of its legal right to access its parcel in favor of allowing neighbors to maintain their encroachments on Rodney Avenue constitutes an arbitrary and capricious action by the Planning Commission. It is also important to note that the Application's modest 18-home development will not significantly impact traffic on Rodney Avenue. Ex. C at 2. Furthermore, the Planning Commission's recommendation of denial of the Major Application based on traffic concerns is arbitrary and capricious.[22]

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[21] Additionally, the City Staff's February 19, 2020 review of the Minor Subdivision acknowledges that such an access point could not legally be built on the Fisher House lot. ("[I]t would appear that a 40-foot or 50-foot ROW could not be incorporated into the lot since it would not be possible to meet the required front yard requirements for the R-2 Zone."). See audio. Minutes not finalized.

[22] *See East Lake Partners*, 655 A.2d at 821 (holding that concerns related to traffic and a denial based on those concerns as they relate to the general health, welfare, safety and convenience of the neighborhood was arbitrary and capricious.).

Again, the Recommendation wrongly attempts to deprive my client of its right to access its property. It is undisputed that a landowner has the right of access to a public street abutting its property. *State ex rel. State Highway Dep't v. 14.69 Acres of Land,* 226 A.2d 828, 831 (Del. 1967). Deprivation of that right of access had been held to be a taking which requires the payment of compensation. *Id. See also State ex rel. Sharp v. 0.62033 Acres of Land*, 110 A.2d 1 (Del. Super. Ct. 1954), *aff'd*, 112 A.2d 857 (Del. 1955). If deprivation of access to a property causes the parcel to be landlocked, it may constitute a taking of the entire property requiring the entity responsible for the taking to pay just compensation equal to the full market value of the property. *14.69 Acres of Land*, 226 A.2d at 832. Here, the Planning Commission seeks to deny my Client's legal right of access, causing the property to be legally and actually landlocked, in order to "protect" the existing quality of Rodney Avenue.

(2) The Recommendation's argument is further without merit because no legally sufficient entrance can be constructed on the Fisher House lot. The City Code requires at least 125 feet of frontage for a road connecting Pilottown Road to Fishers Cove, which the Fisher House lot does not possess.[23] Further, an access through the Fisher House lot would likely require the demolition or relocation of an historic home. To imply that the City and the public would be better served by demolishing a culturally and historically important 18th century home, than by utilizing an already-existing public right-of-way dedicated specifically for the purpose of allowing access to Rodney Avenue and the Fishers Cove lot, is unfathomable. By denying my client access through the publicly dedicated Rodney Avenue in favor of (a) a proposed entrance that is not viable or legal under the City Code and (b) the existing residents on Rodney Avenue, the Recommendation unlawfully proposes to land lock my client's property. *Judge v. City of Rehoboth Beach*, 1993 WL 401873, at *5 (Del. Ch. Sept. 9, 1993) (holding that a "[c]ity may not effectively land lock a particular landowner by refusing access to a public street, while allowing other favored landowners the right to access the [c]ity's public streets.").

(3) Lastly, the City Code expressly permits that stub streets, such as Rodney Avenue, "will be located or easements will be granted to as to permit the future development of interior parcels." City of Lewes Code of Ordinances § 170-

[23] The City Code requires 50 feet for a public road right of way (City of Lewes Code of Ordinances § 170-27(E)(1).) and also requires 75 feet of street frontage (See Table of Dimensional Regulations for R-5, LC and LC(H) Zones) for the residential dwelling on the property. Additionally, any intersection requires a 10 foot radius of the right-of-way lines at an intersection, thus further increasing the frontage requirements (City of Lewes Code of Ordinances § 170-27(I)(1).

27(a)(3). The Recommendation proposes to unlawfully deny my client access to a public street, with no legal alternative access. Respectfully, City Council should afford this suggestion no weight.

(c) **Ancillary Concerns**.

(1) **Expense Outweighs Return**. Mr. Panetta of the Planning Commission confusingly raised concerns that the estimated expense to the City of the Major Application cannot be justified on the basis of the estimated tax returns to the City. Yet, in making such an assertion, Mr. Panetta does not cite anything in the record, and *sua sponte* proffered his view that if the area were to flood, then the City would be stuck with the cleanup costs and those costs would outweigh the benefit to the City. First, if the properties were to flood, common sense would dictate that individuals would not simply abandon homes with values likely in excess of $1,000,000; and we further find it unlikely that the City would be stuck with cleanup costs. Second, the Applicant's engineer and the City's engineer recognize that through the use of stormwater retention basins, swales and a possible outfall pipe to the canal, the development can absorb outfall storm and flood waters to improve drainage, and therefore lessen any adverse impact on surrounding property owners. Finally, the record clearly indicates this project will generate revenues for the City and that these revenues will outweigh any potential expenses to the City. Mr. Panetta further asked for a "clear analysis" of this issue, a request that, to our knowledge, has never been made of any applicant in the City's history. We believe the analysis is clear as set forth above, that this criteria for subdivision approval has been met.

(2) **Use of Fill**. Ms. Moser of the Planning Commission raised a concern that the use of fill was inconsistent with City Code. This was surprising to the Applicant as the Major Application is zero net fill in the flood plain. As such, there is nothing in the record or City Code to support this contention by the Planning Commission.

In sum, the Planning Commission's recommendation of denial was arbitrary and capricious and fraught with misconceptions and misunderstandings of the law and facts. As such, the Mayor and City Council should reject the Planning Commission's recommendation and grant preliminary consent for the Major Application.

II. The substantial record established by the Applicant more than satisfies the standards set forth in § 170-19(E) for Preliminary Consent of the Major Application.

After the close of the public record before the Planning Commission on August 30th, 2019, the Planning Commission was charged with recommending approval, approval with conditions, or rejection of the Major Application to the Mayor and City Council, based on its consideration of twenty-two factors under City Code § 170-19(E). The Planning Commission elected to recommend rejection of the Major Application with proposed conditions and recommendations, which was not a legal option provided under the City Code; yet again, the Planning Commission chose to ignore established regulations. Why would the Planning Commission make recommendations and propose conditions and then recommend rejection of the application? Their procedure and decision belies logic, distorts their duty and affronts the Code.

More importantly, contrary to the Planning Commission's findings and ultimate recommendation, the record established by the Applicant here more than satisfies each of the factors under City Code § 170-19(E).

(1) **Compliance with the provisions of this chapter, Chapter 197, Zoning, and any other applicable provisions of the Municipal Code of the City of Lewes.** The Major Application complies with all applicable chapters and provisions of the City Code.

The site plan complies with the property's R-2 (Low Density Residential) zoning. City Code § 197-26. All lot dimensions exceed the required minimums: the average lot size is 12,832 square feet, 29% greater than what is allowed. The City Engineer has concluded that the property is suitable for the proposed subdivision.[24] The City Engineer has further concluded, with minor adjustments that will be addressed, that:

> *All building lots (1-18) are suitable for subdivision as requested. The applicant's engineer's changes to the plans have ensured that all developments, lots, and properties are provided with a drainage system that is*

[24] Ex. G at 2.

> *adequate to prevent the undue retention of surface water on the site. The changes have also eliminated the previously proposed stormwater infiltration basins.*
>
> *[* * *]*
>
> *Certification of the Plat Plan is complete and in full accordance with the subdivision regulations, as well as fits into a plan for orderly development of the City[.]*[25]

Further, as described above, any "changes" to the Major Application made by the Applicant after March 2019 were merely made as an offer in response to the City's flood study, which is not legally binding on the applicant. However, the Major Application as submitted in March 2019 complies with all aspects of the City's zoning and subdivision law.[26] As testified by the Applicant's engineers, the plan will not increase flood hazards to adjacent properties, nor will the planned buildings be structurally supported by fill.[27] Further, the Applicant provided substantial evidence that providing additional access to the Fishers Cove lot in its August 30, 2019 letter, which explained, in no uncertain terms, that "[t]he [City] Code requires a total of 125 feet of frontage for a road from Pilottown to Fishers Cove directly[, and t]here is simply not enough frontage on Pilottown Road for that to be possible."[28] Finally, the Applicant will, of course, submit all required permits at the necessary stage of review.

(2) **Integration of the proposed major subdivision into existing terrain and surrounding landscape.** The development's oversized lots, generous open space, and landscaped buffers ensure its integration into the existing terrain and surrounding landscape.[29]

The Major Application preserves all existing trees within non-tidal wetlands and all existing trees within and south of the Open Space Parcel A. All trees on lots 8 through 18 will be preserved to the greatest extent practicable.[30]

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[25] *Id* at 2.
[26] Ex. E at 7.
[27] *Id.* at 1-3.
[28] Ex. I At 7.
[29] Ex. E at 1.
[30] *Id.* at 2.

(3) **Minimal use of wetlands and floodplains.** No wetlands will be disturbed by the proposed development. The Major Application further makes minimal use of floodplains to the maximum extent feasible.[31]

The Applicant's engineers have testified that the Major Application, as submitted in March 2019, will minimize impacts to adjacent properties and will not increase the flood hazard to adjacent properties.[32] In response to the City's flood study, issued after the submission of the Major Application, the Applicant's engineers devised ways to actually *improve* drainage and reduce flooding on adjacent properties, which the Planning Commission rejected as "a wholesale redesign of the March [Major A]pplication."[33] The Applicant contests the imposition of any requirement that the Applicant contribute to the flood study, which is not required by law, and which would impose a substantial and unfair burden on the Applicant.

(4) **Preservation of natural and historical features.** An arborist has prepared a report which confirms that there are no specimen trees in the location of the proposed development, and most trees on the property display less than twenty (20) years of growth. The proposed development will preserve all existing trees within non-tidal wetlands, and all existing trees within and south of the Open Space Parcel A. All trees on lots 8 through 18 will be preserved to the greatest extent practicable. If approved, the Minor Application will preserve the historic Fisher House.[34]

(5) **Preservation of open space and scenic views.** The Major Application's oversized lots and planned walking path will preserve the property's scenic views, as described in the plans and testimony. The property boundary along the Great Marsh will be preserved in its natural condition, thereby preserving scenic views of the wetlands from the proposed lots and public roads.[35]

(6) **Minimization of tree and soil removal and grade changes, except to ease flood concerns.** Tree and soil removal will be minimized to the maximum extent feasible; as discussed above, the Major Application makes all efforts to preserve existing trees, where practicable. Ex. I at 3. In addition, tree planting will be required.[36]

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[31] Ex. D at 4.
[32] *Id.* at 1-3.
[33] Ex. C at 1.
[34] Ex. E at 2.
[35] *Id.*
[36] *Id.*

The Applicant has confirmed on the record that its use of fill will be compliant with City Code § 197-73(D)(5) and all other provisions of the City Code.[37]

(7) **Screening of objectionable features from neighboring properties and roadways.** The Major Application maintains fifteen (15) foot landscaped buffers between adjacent properties and presents no objectionable features. The applicant shall submit a final landscape plan to the Parks and Recreation Committee for review.[38]

(8) **Provision for water supply.** Public water shall be provided by the City, and the water plan and design will meet or exceed the requirements of the State Fire Marshal's office.[39]

(9) **Provision for sewage disposal.** The Major Application adequately provides for sewage disposal by gravity to a pump station within the City, which will discharge to sewer provided by the City.[40]

(10) **Prevention of pollution of surface water and groundwater.** The Major Application prevents pollution of surface water and groundwater, and complies with all applicable stormwater management regulations and requisite water quality measures.[41]

(11) **Minimization of erosion and sedimentation, 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.** The Major Application minimizes erosion, sedimentation, changes in groundwater levels, increased rates of runoff, and potential for flooding, as well as includes drainage design which maximizes groundwater recharge. The Major Application complies with all stormwater management and erosion and sediment control regulations. There will be no adverse impacts to area flooding.[42]

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[37] Ex. D at 2-3.
[38] Ex. E at 4.
[39] *Id.* at 5.
[40] Id.
[41] Ex.D at 5.
[42] *Id.*

The Applicant's engineer has testified that the stormwater management plan submitted with the March 2019 Major Application will not have an adverse impact on adjacent properties, and notes that "[t]he Application must comply with State stormwater management and erosion and sediment control regulations as administered by DNREC and [SCD] . . . . [R]unoff rates will, at a minimum, conform to DNREC regulations and there will be no adverse impact[] to area flooding."[43] Therefore, to the extent that compliance is required by local, state, and federal regulations, the Applicant will comply with these conditions at the appropriate stage of review.

(12) **Provision for safe vehicular and pedestrian movement within the site and to adjacent ways.** The community will be accessed by Rodney Street. Ex. J at 3. In 1947, Rodney Street was deeded to the Commissioners of Lewes "to be used as a public street or highway" fifty feet in width. Book 371, Page 308. Section 170-27(a)(3) of the City Code provides that "[s]tub streets will be located or easements will be granted so as to permit the future development of interior parcels." Streets are defined in City Code § 170-60 as "furnishing access to abutting properties and space for sewers and public utilities."

Section 170-27(B) further provides that: "Streets shall be arranged to conform to the arrangement of both existing and planned streets, so as to form a harmonious and systematic development of the City's secondary roads and through highways, and shall be connected with such existing roads and highways so as to form continuation thereof. Residential streets shall be laid out so as to discourage their use as secondary roads or through highways." Per the City of Lewes Comprehensive Plan, the roads shall be designed to consider safety and potential flooding.

The access on Rodney Street not only conforms to the City's street policy, it is required. The internal streets will be designed to City and Fire Marshal standards. The circular pattern creates a harmonious pattern and discourages the use as a secondary road. Finally, the sidewalks and proposed easement encourage pedestrian and bike movement. The internal roads will be designed for minimal speed limits, and improvements to Rodney Street may be made as required by City Council.[44]

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[43] *Id.*

[44] Ex. I, August 30 2019 Letter and Proposed Findings.

(13) **Effect on area property values.** Single Family Homes are a permitted use in the R-2 Zoning District and will not have an adverse effect on area property values. Because of the location and size of these lots, the anticipated purchase price for lots in this market fall between $419,000 and $619,000. The homes constructed on the lots will all likely sell for $1,000,000 or more. Houses in the adjacent Rodney Avenue community have sold for between $387,000 and $850,000 from 2005-2019. Id. In the attached affidavit, a licensed appraiser opines that "[i]t is very likely that after the completion of Fisher's Cove, the prices [of the homes on Rodney Avenue] will increase accordingly."[45]

(14) **Effect on schools, public buildings and community facilities.** The development will have no adverse impact on schools, public buildings and community facilities. Owners will make significant contribution to the Cape Henlopen School District through payment of Sussex County Real Estate Taxes. *Id.* The increase in tax revenue to the school district will assist in the maintenance and operations of the school system. The City impact fees and annual taxes should be a significant net positive for city revenue.[46]

(15) **Effect on area roadways and public transportation. The Planning Commission, by majority vote, may require a traffic impact study conducted by an outside agency at the expense of the applicant, should conditions warrant such a study.** Because there will be only eighteen lots and some of those homes will be temporary residents, the effect on area roadways should not be significant.[47] Further, the Planning Commission did not require a traffic impact study when the Major Application was before it. At the August 21, 2019 hearing, Mr. Dev Sitaram, P.E. had the following in his testimony notes:

> *In accordance with the Trip Generation Manual published by the Institute of Transportation Enginee[rs,] the 18 single family detached homes will generate an average daily traffic of 215 trips.*[48]

Furthermore, the Delaware Department of Transportation Development Coordination Manual provides that DelDOT does not require a TIS if

[45] Ex. J.
[46] *Id* at 5.
[47] *Id.* at 5
[48] August 21, 2020 testimony notes.

> *[a] proposed land use change or development will generate 500 vehicles per day [] or more in average weekday or weekend trips, or will generate 50 vehicles per hour [] or more during any one hour time period during any day of the week, be it weekday or weekend, that DelDOT finds to be critical with regard to traffic impact.*

DEL. DEPT. OF TRANSP. DEV. COORDINATION MANUAL § 2.2.2.1(A). The Manual further provides that if a local land use agency "has more stringent TIS warrant requirements," DelDOT will require a TIS pursuant to the local land use agency's requirements. *Id.* § 2.2.2.1(C). However, the Planning Commission did not require a TIS on the Major Application.

(16) **Compatibility with adjacent area land uses.** The proposed development is consistent and compatible with adjacent area land uses.[49]

(17) **Effect on area waterways.** There will be no adverse effect on area waterways, and the objective of the proposed development's final engineering design is to improve flooding and draining conditions.[50] The Applicant's engineer has testified that the Major Application's design "will comply with State stormwater management regulations that prescribe requisite water quality measures intended to prevent pollution to area surface and groundwater." [51]

(18) **Whether estimated costs to be borne by the City during construction, if any, can be met from available City funds which reasonably may be anticipated to become available to the City and applicable to subdivision purposes.** The City will not bear any costs during construction; the Applicant will cover all associated costs. Further, the City Code provides, as a standard condition of approved major subdivision applications, that "[b]efore any work is started or contract awarded, the developer must furnish a performance guarantee sufficient to cover 150% of the estimated cost of the work to be performed pursuant to the subdivision site plan and improvement construction plan. The performance shall be in a form acceptable to the Mayor and City Council[.]" City Code § 170-21(C).

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[49] Ex. E and I.
[50] Ex. G at 7.
[51] *Id.* at 5.

(19) **Whether the estimated expense to the City can be justified on the basis of estimated tax returns which would accrue to the City within a reasonable period of time.** See above.

(20) **Recognition of scenic byways and walkability.** The proposed development will have sidewalks on both sides of all proposed public streets, as well as a walkway across the Fisher House property to Pilottown Road. These improvements will increase the walkability of the area and connect the adjacent properties to Pilottown Road and the Rehoboth Canal.[52]

(21) **Job creation.** Jobs will be created by the site work and home construction of the proposed development. Ex. J at 6. The National Association of Homebuilders indicates that for every 1,000 single family homes built, 2,970 full time jobs are created. *Housing Equals Jobs Resonates with Lawmakers*, National Association of Home Builders (last visited Feb. 27, 2020) https://www.nahb.org/News-and-Economics/Housing-Economics/Housings-Economic-Impact/Housing-Equals-Jobs-Resonates-with-Lawmakers. Additionally, new residents of the development will create additional need for goods and services.[53]

(22) **Providing diverse housing options.** These housing types will be distinct from those on Rodney Street and some of the other housing on the offshoots of Pilottown Road in the West. Ex. J at 6. The proposed development's oversized lots are distinct from those common within the downtown City area or beachfront housing.[54]

III. Thus far, treatment of the Major Application and the Applicant has been objectively inconsistent with prior applications, the City Code and Delaware case law.

The Major Application has been subject to a review process and a level of scrutiny and disparate treatment by the Planning Commission unlike any previous application in the preliminary consent process. The process undertaken by the Planning Commission was fraught with illegalities, conflicts of interests, procedural errors and overly burdensome requirements which had no basis in the City Code. As such, sending the application back to the Planning Commission makes no sense, as the Planning Commission has already demonstrated an inability

[52] Exs. A, E and I.
[53] Ex. I.
[54] *Id.*

to properly consider the Major Application by exposing it to exhaustive scrutiny beyond that of any other application and beyond what is required by the City Code. The Planning Commission's unfair treatment of the Major Application has resulted in costly delays for the Applicant.

(a) **Delays in Preliminary Consent Process.** Repeatedly throughout the Preliminary Consent review process before the Planning Commission, the Applicant was provided feedback by the City's engineers, professionals, the Planning Commission and members of the public. Throughout the process, the Applicant was encouraged to revise the Major Application to account for and address the input received. However, despite the edict that the Applicant address these issues in the Major Application, the Planning Commission then utilized these changes as a basis for delaying and criticizing the review of the Major Application. In doing so, the Planning Commission routinely criticized the Applicant as delaying the process by making the responsive changes. The Planning Commission's placement of blame on the Applicant for delays and criticizing amendments to the plans that were solicited by concerns raised by the Planning Commission and other stakeholders is emblematic of an apparent bias and an arbitrary and capricious review process. Ultimately, the Planning Commission's Recommendation, issued following hours of specific discussion, seeks to punish the Applicant for addressing concerns prematurely raised by citizens and the flood study at the preliminary consent stage.[55]

(b) **Conflicts of Interest Tainted the Planning Commission Proceedings.** As has been detailed at length in the record below, certain members of the Planning Commission had clear and verifiable conflicts of interest with respect to the Major Application. However, despite objections made by the Applicant, no Planning Commission members recused themselves from the consideration of the Major Application. Furthermore, allegations that Mr. Panetta violated the bylaws of the Planning Commission were never addressed or considered. Specifically, Max Walton, counsel to the City, advised the Planning Commission "the body in charge of the rule" is responsible for enforcement of the rule. While the Board of Ethics for the City did address other allegations against Mr. Panetta, it did not, in the words of Mark Harris, chair of the Board of Ethics, make any judgment about ex-parte communications or violations of the bylaws by Mr. Panetta. The Planning Commission never reviewed the issue to determine whether the bylaws had been violated, essentially completely ignoring the bylaw

[55] See *infra* Section I(a)(1) for a full discussion of the Planning Commission's incorrect assertion related to proposed suggestions by Applicant's engineer to address storm water management concerns.

violations by Mr. Panetta by wholesale refusing to address them despite being advised by counsel that the Planning Commission was responsible for enforcement. Mr. Panetta's conflicts of interests and bylaw violations were, unfortunately, not the only issue on the Planning Commission. The Applicant specifically raised concerns about Melanie Moser and a public letter she wrote in opposition of the Major Application. Despite this evidence of bias, Ms. Moser declined to recuse herself and subsequently voted against the Major Application.

As your own counsel, Professor Max Walton, noted in his public training, "[t]here are devastating consequences if you do not recuse when you are supposed to." Further referencing Delaware case law by noting that a failure to recuse had led to a reversal of a board decision because the party that failed to recuse "polluted the entire body. . . ." Interestingly enough, Mr. Walton further referenced Delaware case law by citing a Superior Court case where an appearance of impropriety, followed by a failure to recuse, led to the invalidation of a council action.

Shockingly, or perhaps not so, despite the clear advice of counsel on these issues, Mr. Panetta and Ms. Moser refused to recuse themselves (even after receiving legal advice), voted against the Major Application (and in the case of Mr. Panetta proffered the motion and was the most vocal opponent on the Planning Commission), and declined to formally adjudicate or address the bylaws violations.

(c) **Flood Study Never Before Required**. The Planning Commission commissioned a flood study to show the potential impact of the Major Application on neighboring properties and the area in general. It is important to note that, **prior to the Major Application, no applicant in the history of Lewes had ever been subjected to this separate level of review for flooding and storm water management**. As discussed *infra*, the City Code sets forth clear and objecting standards for storm water management and flooding. Notwithstanding the law, the Planning Commission required the Applicant address concerns raised by the flood study, a task the Applicant begrudgingly undertook at great expense to the applicant.[56] To be abundantly clear, the flood study is not required by City Code, no application had heretofore been required to address any such study and compliance with recommendations from such study is not required by City Code. However, despite no precedent for requiring such a study and subjecting an application to such a study, the Planning Commission utilized the flood study as a basis for their recommendation to deny preliminary consent, despite assertions

[56] See Section I(a) for a complete discussion of Applicant's response to the flood study.

from the City's own engineer and engineers for the Applicant that the Major Application complied with the conditions for Preliminary Consent related to storm water management and flooding. Subjecting the Major Application to a level of degree not required by the City Code and which has not been required by any previous application is the definition of arbitrary and capricious.

(d) **Formal Site Visit Never Before Conducted**. After one of several Planning Commission meetings on this application, the Planning Commission decided that a site visit for members of the Planning Commission and the public was in order. Reluctantly the Applicant complied. It is the understanding of the Applicant that a formal site visit open to the public has never been conducted at a property before, and following this site visit the Planning Commission indicated that they would no longer conduct formal site visits in this same manner. This highlights the Planning Commission's attempt to cater to the vocal constituents by subjecting the Major Application to an unprecedented and unfair degree of scrutiny that exceeds what any other application has been subjected to at the preliminary consent state. It is also important to note that Max Walton, counsel for the City, specifically stated that site visits by the planning commission should only be conducted for general planning purposes and should not be conducted for specific applications.

(e) **Bifurcation of Public Hearing Never Before Conducted**. In another novel act, the Planning Commission voted, against the objection of the Applicant, to leave the public hearing for the Major Application open and to bifurcate the hearing into two separate meetings. The Planning Commission made this decision due to the alleged inability of members of the opposition to have their attorney present at the public hearing. I say alleged as, at the initial public hearing, an attorney was present from the opposition that is from the same firm as the attorney whose unavailability prompted the need to bifurcate. To be clear, in the review process an attorney for the opposition has no greater standard than any other member of the public. It is absolutely inappropriate, and unprecedented, to delay a public hearing simply because a member of the public is unable to attend such a meeting. If we were to delay every public hearing until a date where every member of the public has availability then I would suggest it would be impossible to ever hold a public hearing.

(f) **Requirement for SCD Approval and Review Early in Process**. In making their Recommendation, the Planning Commission indicated that the Application should have sought and obtained SCD approval prior to seeking preliminary consent. Again, this is a novel approach taken by the Planning

Commission as the City Code expressly does not require such approval until the final approval process and, to our knowledge, no other applicant has been required to seek such approval prior to preliminary consent. Furthermore, the City's own planning officer advised the Planning Commission that technical storm water management data is not required at this stage in the process per the City Code. It is clear from the City Code and precedent from all other applications for major subdivisions that SCD approval is sought after preliminary consent is granted and is a condition of final approval. The Planning Commission's attempt to require such approval as a prerequisite of preliminary consent is just another example of their disparate and inappropriate treatment of the Major Application.

(g) **The Planning Commission Allows Public Comment Outside of Public Hearing**. Finally, at the outset of 2019, the Planning Commission scheduled the Major Application for consideration on its agenda. The specific meeting was not scheduled for a Public Hearing, the required legal notice was not posted or mailed and the agenda did not call for a public hearing. However, after the Applicant expressed at the meeting that its presentation for the record would be reserved for and presented at the Public Hearing, the Chair of the Planning Commission still allowed an attorney for a group of individuals opposing the Major Application to engage the Planning Commission, testify and present evidence. I am aware at least one other similar deviation from proper legal practice by the Planning Commission wherein comment or testimony was taken outside of the Public Hearing. In short, to the extent a Court must review the record established by a Public Hearing, allowing opposition to testify outside of a public hearing taints their entire process.

The above issues do not represent an exhaustive listing of all of the issues with the review by the Planning Commission but do serve as a representation of the clear failure of the Planning Commission to properly administer the City Code in a professional, consistent and timely manner while simultaneously overzealously catering to interested, anti-development parties. As such, we respectfully request the Mayor and City Council render a decision on the Major Application and not send the Major Application back to the Planning Commission where the Applicant is likely to be further harmed by the Planning Commission's failure to adhere to City Code and precedent.

Conclusion

For these reasons and based on the entire record, the Mayor and Council should reject the Planning Commission and allow the applicant, the City engineer and staff to further develop these plans pursuant to City Code.

Respectfully submitted,

FUQUA, WILLARD, STEVENS & SCHAB

By _____
Timothy G. Willard, Esq. (#2824)

Pc: Burke and Rutecki LLC

Enclosures: Exhibits A-J