

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

February 28, 2020

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

Re: Concerned Citizens' Opposition to the Fishers Cove Subdivision

Dear Mayor Becker and Council Members,

On behalf of myself and the twenty-seven households I represent on Rodney Avenue, Hoornkill Avenue, and Friends (the "Concerned Citizens"), we very much appreciate the opportunity to outline our concerns and issues relating to the major subdivision application for Fishers Cove (the "Plan"). As you are no doubt aware, my clients have been actively involved with the process at the Planning Commission level and have reiterated our concerns in correspondence and testimony that are already part of the very substantial record in this matter. After a deliberate and careful review, the Lewes Planning Commission voted 8-1 to recommend that the City Council reject the request for Preliminary Consent for a Major Subdivision for Fishers Cove. We respectfully request the City Council affirm the Planning Commission's recommendation and reject this plan.

For the reasons set forth during our presentations and correspondence before the Planning Commission, and as further expounded on in the summary below, the Concerned Citizens respectfully request the City Council to reject the proposed application for preliminary approval. Although we recognize that 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, thus resulting in the Planning Commission's recommended rejection of the Plan. 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 fundamental information showing that their storm water 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 asked the Planning Commission, and now the City Council, 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. None of these facts have changed since the Planning Commission recommended rejecting the proposed plan on November 14, 2019. 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 is exceedingly clear, the Developer has not satisfied this burden and should not be permitted to move forward with the proposed plan.

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 Multiple and Fundamentally Different Storm Water Management Plans:** 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 eliminating of the storm water basins and diverting 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, their staff, or the City’s Engineer for review and comment in the Report 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. Moreover, none of the citizens on the other side of the canal have had any opportunity to investigate, let alone testify to the Planning Commission, on how this plan could impact their properties.¹

¹ In Mr. Willard’s December 9, 2019 letter to City Council, he suggests that the SWM Plan in the application stands on its own, and the supplement concepts were used to merely identify “additional potential options . . . which could be made during the final approval process.” If the Developer was so confident in the SWM Plan that was

When pressed, and facing the prospects 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 storm water 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. 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.

In recommending rejection of Preliminary Consent, the Planning Commission stated:

- 1) "The applicant has not reasonably demonstrated that the proposed SWM plans could actually be built and function to not increase the flood hazards to adjacent properties."
- 2) "The SWM Plans failed to address the high ground water table with respect to the SWM basin design among SCCD/DNREC requirements."
- 3) "The City commissioned Flood Study shows that the development, if it could be built, would increase flooding for adjacent properties." As a side note, at the hearing, the Developer acknowledged the Flood Study, promised a plan to address, yet did not deliver same.
- 4) "The 'Conceptual' design changes that the applicant discussed at the August 21 LPC Public Hearing would require wholesale redesign of the March application and invalidate all reviews that have been done under 170-19 to -date."

Any one of the above issues cited by the Planning Commission warrant rejection of the Preliminary Consent based on a plain reading of the City Code. The most shocking of all is point 4 above, and it is important to digest what occurred. The Plan the City Council is reviewing is massively different than the concepts floated at the August 2019 hearing. This radical plan change was the product of the Developer acknowledging the very SWM plan the City Council is now considering, does not work. In a letter to City Council dated December 9, 2019, the Developer's Counsel, Mr. Timothy Willard, Esq., attempted to rebut the Planning Commission's nearly unanimous finding that the proposed SWM plan was inadequate based upon testimony from that Developer's Engineer that "the Application will result in an engineered design for Fishers Cove that will provide for positive drainage via swales and storm drains and not cause retention of surface water on

submitted with the application, then why make the request for these documents to be considered part of the record for reviewing the SWM Plan at all? The Developer should not be permitted to submit additional rough sketches of SWM concepts that have not been vetted by the City's engineers, the planning commission, and the public. This application should be evaluated on the SWM Plan as proposed, not some last minute sketches that fundamentally alter the proposed SWM Plan in the hopes that something will eventually stick.

neighboring properties.” The dogmatic testimony from the Developer’s engineer that they will eventually design a functioning SWM plan if permitted to move forward cannot overcome the glaring deficiencies with the Developer’s proposed plan (especially when these same engineers have failed to present a functioning plan after multiple iterations). In other words, it would be a dangerous precedent to allow a plan to move forward without a functioning SWM plan concept on the basis of an engineer’s testimony that they will eventually come up with a working plan.

B) **Failure to Satisfy Requirements of Section 170-19(E)**: The Developer wants the City Council 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 Planning Commission and City Council 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 August Planning Commission meeting was a major change from the last plan submitted, and the City did not have an opportunity to review prior to the meeting.

C) **Failure to Seek Guidance from SCD**: The Developer ignored the City Planning Staff’s recommendation regarding the exact issue that concerned 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 a 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 Consent, they responded “because legally we do not have to.” Given that the Developer must eventually obtain SCD approval prior to final approval of the 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 City Council 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. Although the Developer’s Engineer attempted to downplay the results of the Flood Study, no plans have been submitted to date to provide the adjacent property owners with any confidence that the negative impact caused by the development of Fishers Cove will be mitigated.

II. ACCESS TO PROPOSED DEVELOPMENT

As noted in our prior letters to the Planning Commission, 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 owned by the Developer and was part of a previous iteration of the 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 City Council consider and adhere to the sound precedent established by their predecessors in 1989.

In Recommendation No. 631 to the City Council, the Planning Commission overwhelmingly recognized the significant costs and burden to the City and Rodney residents of using Rodney Avenue as the main access point to Fishers Cove. Specifically, the Planning Commission found that, "Rodney is a public road widening this road will impact the property values of the ~16 homes located on it by greatly reducing the house setbacks, reducing off street parking and increased traffic (170-19 (E) 13)." Moreover, the Planning Commission noted, "While it is important to protect historic properties, the Fisher house, requiring all of the traffic for this new development onto Rodney is an unreasonable cost." We agree that the preservation of one historical house should not be at the cost of those presently residing in the 16+ homes on Rodney and Pilottown. This is especially true when the Developer could seek a variance to permit an entrance from Pilottown without impacting the Fisher House, or could otherwise explore moving the home to another location.

The Developer has direct access to Pilottown Road. Despite the obvious obstacles with utilizing Rodney Avenue, the Developer went forward with a Minor Subdivision Plan to carve off a part of the original plan, the piece of land that directly abuts Pilottown Road. It appears the developer is trying to landlock its parcel so that Rodney Avenue is the only possible access. If the storm water/drainage/flooding issues can be resolved, the Developer should be required to utilize that Pilottown 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. While the Developer insists that that an entrance to the proposed community cannot be constructed without moving or destroying the Fisher House within the code, they certainly can seek a variance from the Board of Adjustment. For a developer that is required to be very creative in trying to deal with insurmountable storm water issues, it should therefore be required

to implement the same effort to use the Pilottown access, particularly since the Rodney Avenue access was already previously denied in 1989.

III. CONCLUSION

Once again, I want to reiterate my clients' appreciation for the Planning Commissions' careful consideration of the issues we have raised and its sound and overwhelming recommendation to reject the Developer's application for Preliminary Consent for a Major Subdivision for Fishers Cove. 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.

Since the Developer has failed to provide information to allow consideration of the provisions of Section 170-19(E), we respectfully request that the City Council affirm the Planning Commission's recommended rejection of the proposed plan for Fishers Cove.

Respectfully submitted,



WILLIAM J. RHODUNDA, JR.

cc: Concerned Citizens
Ann Marie Townsend, Lewes City Manager
Glenn Mandalas, Esq.
Thomas P. West, AICP, Planning Consultant
Janelle Cornwell, AICP, Planning and Development Officer