

**MINUTES  
BUSINESS MEETING  
NEW CASTLE COUNTY PLANNING BOARD  
DEPARTMENT OF LAND USE - NEW CASTLE ROOM  
87 READS WAY, NEW CASTLE, DELAWARE  
November 19, 2019  
9:00 A.M.**

The Business Meeting of the Planning Board of New Castle County was held on Tuesday, November 19, 2019 in the New Castle Room of the Government Center Building, 87 Reads Way, Corporate Commons in New Castle, DE.

The meeting was called to order by Chairperson Karen Peterson at 9:03 a.m.

The following Board members were present:

Leone Cahill  
Jonathan Cochran  
Joseph Daigle  
Leah Gray  
William McGlinchey  
Karen Peterson  
Robert Snowden  
Kiana Williams

The following Board members were absent:

Ruth Visvardis

Planning Board Attorney, Office of Law

Randolph Vesprey

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

Richard Hall	Antoni Sekowski
George Haggerty	Doug Hokuff
Matthew Rogers	Marisa Lau

The following members of the public were in attendance:

None.

**MINUTES**

October 15, 2019

**DEFERRALS**

None.

## BUSINESS

**App. 2018-0581-S/Z & App. 2019-0596-SV** East Side of N. Old Baltimore Pike, directly across from Browns Lane. Exploratory Major Subdivision Plan, Rezoning, PLUS review and Subdivision Variances for **Eagle Hunt** proposes to rezone 13.95 acres from Neighborhood Conservation (NC-21) to Suburban Transition (ST) to construct a 24-lot single family attached dwelling development on a cul-de-sac longer than 300' in total length (Section 40.20.230.J.1), having an average number of lots served by it greater than is sixteen (16) (Section 40.26.330). Ord.19-009 will rezone 13.95 acres from Conservation (NC-21) to Suburban Transition (ST). NC21 Zoning. CD 1. White Clay Creek Hundred (T.P. 09-030.00-110)

The Department has considered the *Standards for Zoning Map Amendment* in Section 40.31.410, A through E, the proposed plan, and comments received from agencies and the public. Based on this analysis the Department is of the opinion that the standards are met by this proposal. The Department recommends **CONDITIONAL APPROVAL** of Ordinance 19-009 subject to the following conditions:

1. The new dwelling units shall be generally consistent with the architectural renderings submitted at the October 1, 2019 public hearing by the Applicant, as determined by the Department.
2. The bufferyard opacity levels along Old Baltimore Pike shall be generally consistent with the architectural renderings submitted on October 31, 2019 by the Applicant, as determined by the Department.
3. Each unit shall provide a tapered driveway in general conformance with parking location standards in Article 25 of the UDC, as determined by the Department.

At a business meeting held on November 19, 2019, the Planning Board considered the recommendation presented by the Department of Land Use. The Planning Board voted on a motion by Ms. Cahill, seconded by Mr. McGlinchey, to recommend **CONDITIONAL APPROVAL** of Ordinance 19-009 with the conditions as stated by the Department. The motion was **DEFEATED** by a **VOTE of 4-4-0-1** (Yes: Cahill, Cochran, McGlinchey, Williams; No: Daigle, Gray, Snowden, Peterson; Abstain: None; Absent: Visvardis).

The Department has reviewed the appropriate UDC standards and the technical evaluation of the Engineering Section. The Department of Land Use recommends **CONDITIONAL APPROVAL** of the variance requested in Application 2019-0596-SV subject to the following:

1. Applicant shall continue to coordinate with Christiana Community Center to preserve their current point of access from Patterson Lane or another acceptable point.

At a business meeting held on November 19, 2019, the Planning Board considered the recommendation presented by the Department of Land Use. The Planning Board voted on a motion by Ms. Williams, seconded by Mr. Daigle, to grant **CONDITIONAL APPROVAL** of Application 2019-0596-SV with the condition as stated by the Department. The motion was **DEFEATED** by a

**VOTE of 4-4-0-1** (Yes: Cahill, Cochran, McGlinchey, Williams; No: Daigle, Gray, Snowden, Peterson; Abstain: None; Absent: Visvardis).

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

The Board Chair had several questions. Ms. Peterson asked the Department to clarify the number of homes that could be built on the parcel under the current zoning of NC21. Ms. Lau responded that the applicant had stated 8-10 homes could be built at the public hearing. Matt Rogers, Planner, confirmed that the site would accommodate 8-10 homes.

Ms. Peterson then asked for a better explanation of the application standards. Reading from Section 40.31.452 of the Unified Development Code, Ms. Peterson stated that “all of the following standards [in the section]” needed to be met in order to approve a variance from subdivision standards. The Department had stated in the recommendation that the application does not meet standard A1: “There is a practical hardship for the development of the site if the development must adhere to the standard” for cul-de-sacs in the code; yet, the Department had recommended conditional approval of the variance.

In the discussion that followed, Department members and Board members noted that subdivision variances have had to meet standards A1, A2, A3, or A4; as well as B, C, D, and E in the past. Mr. Rogers stated that the Office of Law had determined this to be the original intent of the section. In response to Ms. Peterson’s question, he added that he was not aware of any written interpretations or decisions. He also noted that the Board could determine that the plan met any of standards A1-4 in their application decision, regardless of which of these the Department deemed had been met in their recommendation. Mr. McGlinchey noted that to satisfy the condition for standard A, only one of standards A1, A2, A3, or A4 needed to be met. Mr. Snowden concurred, adding that the punctuation read “A1...; A2...; A3...; or A4” in this section.

Ms. Cahill inquired about the condition in the Department recommendation for the subdivision variance, which stated that the “Applicant shall continue to coordinate with Christiana Community Center to preserve their current point of access from Patterson Lane or another acceptable point.” Ms. Lau replied that the access point would be a joint decision made before the record plan could be approved by the Department and DelDOT. The proposed access point as shown on the exploratory plan is subject to change, pending an agreement on its location by the applicant and the Center. Antoni Sekowski, Planning Manager, added that DelDOT is requiring the existing entrance off Old Baltimore Pike be removed, and a new entrance to be constructed. The new cul-de-sac street will have a connection to the private road (Patterson Lane) from which the driveway for the Center takes access. He added that the Department believes the Center can retain its existing driveway. In response to a follow up question from Ms. Cahill, he added that the Center already had access to Patterson Lane through an easement, and a new agreement would not be required by the County.

Mr. Snowden stated his reasons for opposing the motion to approve the rezoning application. He noted that a number of project applications that had come before the Board lately contained a substantial tract of protected resources with development restrictions. The net density cited in the Department recommendation (1.86 du/acre) is a false indicator of the project density, since the proposed development area is much smaller than the total parcel area of 14 acres. Protected resources being subject to development restrictions cannot constitute any type of hardship. Lastly, he reiterated his point made at the public hearing that the proposed townhomes are not consistent with the historic character of the Christiana historic district, in his opinion.

Ms. Peterson agreed with Mr. Snowden that the subdivision did not fit with the character of the surrounding area. The only structures in the immediate vicinity of the subject parcel are single family detached dwellings. The higher density projects cited in the recommendation are located on the outskirts of Christiana Village, or are not in the village such as Christiana Mall. The level of intensity and scale of the proposed development are not compatible with the existing neighborhood. As she expressed at the hearing, she also has concerns about the impact of the proposed development on infrastructure in the area, particularly the drainage system. Lastly, the protected resources on the parcel are not a hardship for the applicant as was stated at the hearing, and do not justify this request for relief from the standards for cul-de-sacs in Section 40.31.452 of the UDC.

Mr. McGlinchey stated that the formula used to calculate density is prescribed by the Unified Development Code. The Department confirmed that gross density and net density had been calculated for the site using the correct formula. Mr. Sekowski added that the site capacity calculations submitted by the applicant had been reviewed against ST zoning standards.

Ms. Gray clarified that the density would be much higher if calculated based on the number of proposed units (24) and proposed development area (3.81 acres).

Mr. McGlinchey asked about the reference to transit lines in the recommendation. Ms. Lau responded that improvements would be made to the bus stop in front of the new subdivision including a pull off lane for public and school buses. He noted that access to public transit was appropriate for Suburban Transition zoning districts.

Mr. Cochran, Mr. Daigle, and Ms. Gray confirmed that they had read the hearing transcript. Mr. McGlinchey clarified that the Board would vote on a decision on App. 2019-0596-SV, although the applicant could decide to appeal the decision to County Council.

Regarding App. 2019-0596-SV, the following comments were made:

- Mr. Snowden stated that regardless of his vote for the rezoning application, he opposed this application because the proposed project did not utilize good planning principles and the County has a proliferation of long cul-de-sacs.
- Ms. Peterson stated that her reasons for opposing the application were the same as she previously stated.
- Ms. Gray stated that she opposed the application because of safety issues related to such a high density in a relatively small area. She asked for documentation that the proposed plan would not negatively impact the provision of emergency services or otherwise affect safety issues.

**App. 2019-0538 -T.** Text amendment to amend Chapter 40, Article 22 (“Drainage, Utilities, Septic Systems, Parking, Loading, And Lighting”) regarding the subdivision of land zoned Suburban (S) and Suburban Reserve (SR) with on-site wastewater treatment (septic) systems. **Ord. 19-078 is a text amendment to amend Article 22 of the Unified Development Code to regarding the subdivision of land in the Suburban (S) and Suburban Reserve (SR) zoning districts with on-site wastewater treatment (septic) systems.**

The Department of Land Use has considered the Standards for Text Amendment in Section 40.31.420 of the *New Castle County Code* and comments received from other agencies and the public. Based on this analysis, the Department recommends **CONDITIONAL APPROVAL** of Ordinance No. 19-078, to explicitly state that that the limitations on subdividing parcels with onsite

wastewater management systems do not apply to development rights that can be transferred from the subject parcel.

At a public meeting held on November 19, 2019, the Planning Board considered the Department of Land Use recommendation. The Planning Board voted on a motion by Ms. Gray and seconded by Mr. Daigle, to recommend **CONDITIONAL APPROVAL** of Ordinance No. 19-078 subject to the conditions made by the Department of Land Use by a **VOTE of 5-2-1-0-1** (YES: Cochran, Daigle, Gray, Snowden, Williams; NO: McGlinchey, Peterson; Recused: Cahill; ABSTAIN: none; ABSENT: Visvardis)

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

Ms. Gray asked the Department to further explain the explain the transfer of development rights provisions in the proposed ordinance. Richard Hall, General Manager for the Department of Land Use explained that while the ordinance would only permit minor subdivisions on septic, the development rights a property owner had prior to the ordinance could be sold and transferred to areas where there is sewer infrastructure. Ms. Peterson asked if transferring development rights could increase the permitted density on the receiving parcel. Mr. Hall stated that transferring development rights could increase in density, noting that this is a possibility today permitted by the UDC. Ms. Peterson voiced concern that the receiving parcel doesn't have to be in the vicinity of the sending parcel. Matthew Rogers, Planner for the Department of Land Use, explained that both parcels in a TRD have to be located in the same planning district. Mr. McGlinchey stated transferring development rights has rarely occurred in the county. Mr. Hall explained that current zoning regulations don't adequately incentivize the TDRs. He also stated that the *Southern New Castle County Master Plan* examines possible changes to the UDC, including the establishment of a TDR bank to facilitate TDRs.

Ms. Peterson discussed the potential for an unsewered lot could transfer enough development rights to double the capacity of the receiving lot. Mr. Hall and Mr. Rogers explained that the TDR process is complicated by protected resources and geometry of the site, noting that, its not always a simple one-to-one transfer. Mr. Hall reiterated that such a transfer is currently an available option in the UDC. Mr. McGlinchey spoke to other opportunities for developers to increase permitted density. Mr. Rogers stated that there are density bonuses in the UDC for age restricted developments and for the inclusion of moderately priced dwelling units. Mr. McGlinchey, voiced support for TDRs and stating that over time they may become a more prevalent land use tool.

Ms. Gray asked the Department to discuss future sewer service in the East and West Wing. Mr. Hall stated that the County is evaluating extending sewer infrastructure into a portion of the West Wing. He also explained that development is not necessarily imminent across the entirety of the East and West Wings based on projected household growth and existing unbuilt residential lot supply, noting that there is currently adequate supply in southern New Castle County for projected growth over the next 30 years.

Ms. Peterson inquired about the potential for municipalities to annex adjacent land and develop on septic. Mr. Hall explained that there is a process for annexation through State Planning, and that annexations must be in their Comprehensive Plan. He also stated that the County has been reaching out to better coordinate planning efforts. Mr. Hall discussed the fact that further the land surrounding municipalities in southern New Castle County is primarily zoned Suburban Reserve (SR), having a minimum lot size of 5 acres and that current development limitations haven't historically driven annexations. Ms. Peterson asked if there were any parcels in northern New

Castle County that would be affected by the ordinance. Mr. Hall stated that, while there are some unsewered parcels zoned S & SR north of the canal, most are parkland, built or unbuildable.

Ms. Gray, inquired about notification for the current Ordinance, and if there should have been an additional hearing for affected farmers. Mr. Hall explained that the moratorium has been in place for over a year and that there have been 5 public meetings for the *Southern New Castle County Master Plan* over the last year. He further explained that the Ordinance had been properly noticed and adhered to the process for a text amendment in the UDC.

Mr. McGlinchey asked about the status of the 900 pending lots on septic. Mr. Hall explained that some of the developments have been approved, some may evaluate the potential to develop on sewer and the remaining others would be limited to minor subdivisions. Mr. Hall stated that, should the moratorium expire, and a suitable ordinance not be adopted, the Department would receive development plans shortly thereafter. Mr. McGlinchey asked if there is a reason that the Department has seen an increased interest in developing on septic? Mr. Hall stated that likely contributors are the construction of US 301, and the popularity of the Appoquinimink school district. He also discussed that the development of the Core, while not complete, has led developers to look to the West Wing.

Mr. McGlinchey stated that while he supports the goal of the Ordinance, he struggles with a 10 acre and 200-acre parcel of land having the same development rights. Mr. Hall explained that the Ordinance promotes preservation of the bigger landscapes, and that a similar approach was successfully implemented in Maryland in 2012. Ms. Peterson stated that Councilman Carter took exception to the comparison of Delaware to Maryland. Mr. Snowden commented on development patterns in Sussex County and the potential risk of septic failure in future years and stating that the Ordinance might help avert “an immense problem.”

Ms. Gray, asked why there were no proposed provisions for inspections or maintenance on existing systems? Mr. Hall stated that the Ordinance intends to minimize the impact of future developments, while agreeing that the County should do a better job with what is in the ground today. He further explained that to accomplish this, the County would need participate in a process that it has historically not been involved with. He also spoke to potential preemption issues regarding the State Code.

Ms. Peterson provided the following rationale for disagreeing with the Department’s recommendation, consistent with Planning Board Bylaws:

I agree that proceeding with business as usual would result in detrimental impacts to the environment. So we need to do something, and the question is what? The County has put forth a proposal described by some as one size fits all, that would restrict the size of subdivisions on septic to 5 lots. Subdivisions with more than 5 lots would have to be sewer by public sewer. So, whether you have 5 acres to be developed or 500 acres you get 5 lots on septic and that’s it. Some have described it this proposal as a downzoning. Obviously, it is not a down zoning in a legal sense of the term. Nobody is proposing to change the zoning classifications, but I can see how property owners would view it as a de facto downzoning in that it drastically affects their development potential. I have struggled with this proposal because I believe that we need to do something, but I’m not sure what that something is. I’ve come to the conclusion though that whatever we do should be based on solid scientific evidence. This proposal, in my opinion does not do that. It does not consider site specific factors such as soil type, the

water table and ground topography. It simply throws a blanket ban on septic systems over a large area of southern New Castle County without regard as to whether or not septic systems would be harmful in each and every case, whether its 5 lots or 500 lots. Certainly, septic on 5 lots could be very damaging to the aquifer, but we are not even talking about those, they get a pass. For that reason, I cannot support this proposal, unless a sunset provision is added which in effect would continue the moratorium until the *Southern New Castle County Master Plan* is completed and this issue is considered as part of that. I support the moratorium, I would support a continuation of the moratorium, but I can't agree that we just throw this blanket ban over large portions of County without considering whether or not there is actual harm.

Ms. Williams spoke to importance of balancing land rights with the safety of water, land use and growth. She asked about the potential for extending the current moratorium. Mr. Hall stated that while the moratorium could be extended, the underlying issues and conditions would not change. He discussed the University of Delaware (UD) and Duffield Associates studies comparing pollution levels of onsite waste water management facilities and offsite sewer treatment.

Ms. Peterson stated that a parcel based scientific approach should be implemented. She also commented that Councilman Carter has critiqued the scientific validity of the University of Delaware (UD) and Duffield Associates studies. She also asked if a comparison of agricultural operations and septic development had been examined. Mr. Hall stated that soil types and agricultural uses were evaluated in the UD report. Mr. Hall stated soil types haven't deterred development on septic. He also explained that septic development not only impacted water resources but additionally resulted in sprawl.

Ms. Peterson spoke to an inequity between large and small lot owners developing on septic, stating that some farmers held property as an investment. Mr. Cochran and Mr. Daigle stated that the proposed limitations would incentivize developers working with the County to extend sewer service to their property. Mr. Hall explained that the County is only looking to bring sewer to certain areas. Mr. Cochran asked about the rationale for limiting the parcels that will not receive sewer to 5 lots. Mr. Hall stated that the reason for the limitation is to prevent large subdivisions on septic.

George Haggerty, Assistant General Manager for the Department of Land Use stated that if the conversation is solely based on equity, no progress would be made. He further explained that managing growth in an orderly systematic inherently results in some inequities and that you can't preserve and encourage farming while incentivizing residential development on agricultural land. Mr. Haggerty stated that over the last 20 years, he witnessed the initial efforts to provide sewer as a means for directing growth to the Core area. He stated that that was effective until the sewered area began to be built out and the school system improved, resulting in significant increases to lot premiums thus offsetting the reduced site yield for septic subdivisions.

Mr. Haggerty said that the County is faced with monumental change forcing it to examine whether its more prudent to "kick the can down the road" or adopt the proposed ordinance which "hits the pause button." He stated that there is nothing preventing the County from re-evaluating the provisions in the future. He explained that the County had the University of Delaware (Jerry Kauffman) and Duffield (conducted by the former Secretary of DNREC) conduct scientific studies, and that "we should let the studies speak for themselves." He also explained that that while individual onsite evaluation is required by DNREC, they permit property owners to divide a parcel up to 99 lots on septic. He also addressed Mr. Cochran's question regarding expansion of sewer

stating that service would be extended, however it must be expanded in a responsible manner, taking into account emergency management, firefighting, school and transportation infrastructure. Ms. Peterson explained that her concern regarding inequity is a comparison of “acre to acre as opposed to dollars and cents.”

Referring to the What’s Left Map n the Department’s recommendation, Mr. Snowden stated that when looking at the land south of Middletown, based on the development history in the area, and that the current minimum lot size is 5 acres (SR), the ordinance would have a limited impact on that area.

He also stated that while some inequity might occur, the County is evaluating sewer service north of Middletown, reducing the impact. Ms. Peterson asked if the County planned on extending sewer to both wings. Mr. Hall explained that it wouldn’t be feasible financially and environmentally to fully sewer both wings and that the draft *Southern New Castle County Master Plan* has evaluated sewer expansion to the Upper West Wing and very limited expansion into the East Wing. Mr. hall explained that the Upper West Wing has a number of fully built out subdivisions on septic.

Ms. Williams, voiced concern that land owners used potential development rights to get loans. Mr. Hall explained that appraisals for loans evaluate a number of factors including development rights, market as well as what the land is worth as an agricultural use. Mr. Hall also stated that even land encumbered by agricultural easements sell at a high rate.

Mr. McGlinchey asked if it is more expensive to install a septic system as opposed to sewer. Mr. Hall said generally it is more expensive develop on sewer due to infrastructure expansion. Mr. McGlinchey asked if it wasn’t possible to financially disincentivize development on septic. Mr. Haggerty explained that previously the UDC had higher standards than DNREC for septic lots. The result was that land owners would receive Subdivision Variances from the Planning Board based on DNREC’s approval letter, based on them being the permitting agency.

Ms. Gray stated that the condition proposed by the Department to preserve transferable development rights was critical in her support for the Ordinance and inquired as to the process for determining transferable rights. Mr. Hall explained that they based on development capacity calculation in the UDC and that the monetary value is determined through a private transaction. Mr. Daigle said that we shouldn’t only consider that the only economic value for a farm is its development capacity.

Mr. Haggerty identified developments that had used TDRs and stated that Middletown requires sewer service for annexed land.

## **REPORT OF COMMITTEES**

None.

## **REPORT OF GENERAL MANAGER**

Richard Hall, General Manager, announced several upcoming public meetings. On Dec 4<sup>th</sup> the Department is presenting drafts of three ordinances that are part of the GreenNCC initiative. These ordinances have not been introduced at Council yet. Topics include community open space turnover, strengthening forest conservation provisions, and stormwater drainage issues. The Department will go

over the drafts at the public meeting and then take feedback from the public afterwards. Also, the Southern New Castle County Master Plan draft has been released; a meeting to follow up on the draft will be scheduled for early 2020 and the final plan should be completed in the spring. Lastly, the next public meeting on the 202 corridor master plan is on Dec 5<sup>th</sup> at Brandywine High School.

**REPORT OF CHAIRPERSON**

None.

**OTHER BOARD MEMBER COMMENTS**

None.

**COMMENTS FROM THE PUBLIC**

None.

**OTHER BUSINESS**

None.

**ADJOURNMENT**

The Board voted to adjourn the meeting at 11:08 a.m.

**ATTEST:**

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Richard E. Hall, AICP                      Date  
General Manager  
Department of Land Use

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Karen Peterson                      Date  
Chair  
Planning Board