



Delaware Housing Coalition

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September 26, 2010

The Honorable Vance Phillips, President
Sussex County Council
2 The Circle
PO Box 589
Georgetown, DE 19947

RE: New Horizons Community

Dear Councilman Phillips,

I am writing to express the strong support of the Delaware Housing Coalition (DHC) for the New Horizons Community, a development of the Diamond State CLT, proposed for Laurel, Delaware, and subsequently denied by the Sussex County Planning and Zoning Commission. The mission of the Delaware Housing Coalition is to advocate for safe, decent, and affordable housing throughout the state; therefore, we are dismayed to learn of the Planning and Zoning Commission denial of the New Horizons application based on a considerations that are not relevant to the Sussex County Code. The denial can be interpreted as a discriminatory housing practice on the basis of income, and is, in our opinion, illegal based upon the case law that I have detailed below.

The Sussex County Planning and Zoning Commission exceeded its authority by denying the application based on non-code factors, applied an arbitrary standard of compliance, and enabled and encouraged public comment beyond the merits of the application to include inaccuracies, assumptions, absurd and offensive comparisons, and threats that engendered sensationalism.

In addition to the argument made by Mr. Jim Fuqua, attorney for Diamond State Community Land Trust in its appeal, I would like to present some case-law that clearly indicates that the commission lacked authority to reject the site plan.

The Precedent of Delaware Law

First and foremost, the Superior Court of Delaware has repeatedly stated that “people purchasing land zoned for specific use are entitled to rely on the fact that they can implement that use provided that the project complies with all specific criteria found in ordinances and subject to reasonable conditions imposed in order to minimize adverse impact.”¹ Clearly, the commission’s speculations about the needs of moderate income populations are irrelevant to the code, as is the financing of the project. Furthermore, and even more importantly, the same case states that the commission “did not have authority to reject site plan for permitted use on grounds that the project would adversely affect general neighborhood,” nor because “residents did not want land used for project that was permitted use” nor “because of increased traffic absent showing that roads were incapable of accommodating that increase.”

¹ Superior Court case decided on Oct. 31, 1994 (East Lake Partners, Appellant v. City of Dover Planning Commission)

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The Supreme Court of Delaware further noted in a 2008 case that Kent County planning commission exceeded its authority in denying the developer's application for subdivision approval that fully complied with county code. The case clearly states that the commission may not deny an application based on non-code factors such as "agency recommendations, school capacity issues, and concerns regarding the health, safety and welfare of the community."² A copy of the Supreme Court and Superior Court decisions are attached for your review. I strongly encourage you to examine the case law as it demonstrates the error of the Sussex County Planning and Zoning decision.

The Sussex County Planning and Zoning Commission Denial and Conduct of the Hearing

The commission's denial was also based on an arbitrary standard that has not historically been applied to developments that are not labeled as affordable housing. For instance, the Delaware Housing Coalition has reviewed commission's decisions since 2005 that went through the PLUS process. Of the projects that were scheduled for public hearings, New Horizons is the only application that was denied in Level 4 for non-technical reasons. In fact, the common language found in the decisions for other approved Level 4 projects was that "The proposed subdivision meets the purpose of the Subdivision Code in that it protects the orderly growth of the County." This implies that the commission applied a different standard of compliance because of the income of the targeted buyers. It is not the responsibility of the commission to make assumptions about the transportation or complementary needs of a socioeconomic group; nor is it in the commission's purview to develop a different standard of "orderly growth" in Level 4 based on the socioeconomic level of the targeted homebuyers. In fact, we would argue that doing so is discriminatory.

When the County zoned this property AR-1, they implicitly indicated that low-density single family homes were allowed at this site, given that the proposed subdivision meets the code. There is no leeway in the interpretation of the code to make determinations based on the socioeconomic group that is targeted to live within the community.

The discriminatory actions of the commission are further detailed in the transcripts. I was unable to find any mention of a need for "staffing on site" at any other site plan or a request to see the Home Owners Association (HOA) documents. Are these requirements that the County intends to impose for all single family developments or just for low- and moderate-income single family developments? Miss Carol Sue Crimmins is allowed to testify that her home is 2,600 sq. feet compared to her neighbor's home of 5,800 square feet, and yet the commission indicates that the development is out of character with the surrounding homes when it is clear from the testimony that there is significant variation between the existing homes.³ Such a statement would indicate that prosperous homeowners able to build larger homes are welcome, while less prosperous homeowners are not.

Finally, I would argue that the commission acted in an irresponsible and unprofessional manner by allowing public comments that were not applicable to the interpretation of the code and that could be considered as fear mongering. It is the responsibility of the chair to maintain the order and relevance of comments at a public hearing. The following examples illustrate the lack of due order: suggesting that Mr. Fuqua's car was in a photo of a sink hole does not constitute order, allowing Mr. Mike Smith to draw a connection between crime and drug use from a low income area in Rehoboth Beach to the proposed development simply because of the income of the residents, allowing Mr. Smith to draw a comparison to the catastrophic explosion of the Horizon oil rig,⁴ and finally allowing Buddy Joseph to utter a barely veiled threat⁵. Rather, these items perpetuate and encourage falsities designed to create sensationalism.

The Affordable Housing Need in Sussex

The affordable housing need in Sussex is great, and it is simply wrong to deny a subdivision application because it does not fit into the Moderately Priced Housing Unit (MPHU) program that the County has created. The development of the MPHU program was a high point for affordable housing in Sussex County. So, it is terribly misguided for the Sussex County Planning and Zoning Commission to utilize the existence of that program as a

² Supreme Court of Delaware a case decided on December 5, 2008 (Tony Ashburn & Son, Inc., Appellant v. Kent County Regional Planning Commission)

³ Public Hearing transcripts, page 108

⁴ Public Hearing transcripts, pages 93-102

⁵ Public Hearing transcripts, page 142

pretext to block other affordable housing initiatives. The Council indicated its understanding of the needs of its low- and moderate-income residents by developing and implementing the ordinance. However, it cannot be expected to meet all of the county's affordable housing needs, especially those of the lowest-income households. If the county were to require that all affordable housing be developed through this program, then it would have to be radically expanded.

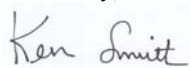
The 2008 Sussex County Comprehensive Plan cites support for the Diamond State Community Land Trust and "encourages more limited home equity projects... i.e. community land trusts..." as one way of meeting the critical shortage of homeownership options available to low- and moderate-income families. The community land trust model serves families that earn incomes below 80% Area Median Income (AMI), a substantial proportion of the population of Sussex County that is not served through MPHU (80% to 120% AMI). The unmet housing need for households at 80% AMI and below is far greater than 80% to 120%.

According to *Who Can Afford to Live in Delaware?* (2010), a study prepared by us, although housing costs have dropped from their highest point, prices are still too high for low- and moderate-income ($\leq 80\%$ AMI) families in Sussex Counties to purchase a house. Despite the recent decline in prices from the peak, the cost of houses has increased since 2000. Between 2000 and the fourth quarter of 2009, house prices have increased 59% in Sussex. Comparing the trend of median house prices with the prices affordable to low- and moderate-income families by county 2006 to 2009, Sussex has an affordability gap of \$80,046, which is the largest gap in the state.

Delaware ranks sixth in national home ownership rankings, but the 2006 overall high rate of 75.2% is not equitably shared by all groups. The proportion of home ownership for minorities is 51% compared to 79% for whites (CFED, 2008), indicating that discriminatory practices against affordable housing affect people of color even more significantly than whites. As I am sure you are aware, discrimination based on race is illegal and the commission's decision based on socioeconomic reasons, rather than the code, lends itself to a challenge on the basis of disparate impact of protected groups.

In your review of the commission's decision, I urge you to consider the need for affordable housing in Sussex, the strides that you have already taken to improve the stock of housing for people of low- and moderate-income, and most importantly, the county code. There is no basis for the denial of the subdivision application for the New Horizons development. I hope that you will be judicious in your decision and I welcome you to contact me if you have any questions about the need for affordable housing in Sussex County. While the development may displease some of the neighbors, denying it is a disservice to a majority of the residents of the county, raises incalculable barriers to affordable housing development, and, based on the attached case law, is illegal.

Sincerely,



Ken Smith
Executive Director

Enclosures

cc: The Honorable Joan Deaver, The Honorable George Cole, The Honorable Michael Vincent, The Honorable Samuel Wilson, Jr.