

BARTLEY

Appeal of Schell Brothers, LLC's Preliminary Subdivision Plan Approval for Coral Lakes (F.K.A. Coral Crossing), App. No. S-2021-06

In the matter of the Bartley Appeal, I move that the Council affirm the decision of the Planning and Zoning Commission on remand in its approval of Application No. S-2021-06 filed by Schell Brothers, LLC for Coral Lakes (F.K.A. Coral Crossing) for the reasons outlined below and based on the standards as read by our attorney, Mr. Moore, which are incorporated herein by reference.

1. The Commission Provided Adequate Notice of the Hearing

Mr. Bartley alleges that the Commission did not provide adequate notice of the public hearing claiming that the notice failed to include "the place at which the text and maps relating to the proposed change may be examined." Mr. Bartley's argument fails on multiple levels. The Commission hearing was advertised in two (2) newspapers (the Delaware State News and Cape Gazette), copies of which have been attached to the Commission's Response together with the corresponding affidavits of publication. Not only do the advertisements include the place, date and time of the public hearing at which the "text and maps" will be discussed and available for examination, but the advertisements also include a statement that, "[a]dditional information pertaining to the applications may be reviewed online at sussexcountyde.gov prior to the meeting or by calling 302-855-7878. Office hours are Monday through Friday, 8:30 am to 4:30 pm." This provides two (2) additional avenues to review the "text and maps" at issue prior to the public hearing. Moreover, the hearing was well-attended by the public, many of whom spoke and/or submitted letters to the Commission. This confirms the notice was adequate.

In addition, Mr. Bartley did not raise an objection to the form of notice at the public hearing. The Council is not permitted to consider any issues and arguments raised on appeal that were not raised below as they are considered waived on appeal. This was confirmed by the Presiding Judge in this matter who ruled, "even if timely raised, an argument or evidence not part of the record below, cannot be considered on appeal."

2. The Commission Held a Fair and Orderly Public Hearing

Mr. Bartley also contends that the Commission "[f]ailed to hold a fair and orderly public hearing." His argument is flawed on its face. First, in its decision on the first appeal brought by the Applicant, Council already found that the Commission engaged in

an orderly and logical review of this Application and, therefore, the issue as to whether the hearing was orderly is moot.

Mr. Bartley also contends that a statement made by Jamie Whitehouse, the Sussex County Planning and Zoning Director, confirming that the Applicant's plan meets the requirements of the Subdivision and Zoning Code somehow opened the record which triggered the public's right to comment. Mr. Whitehouse's statement did not add evidence to the closed record; it was a statement as to the application of the Code to the evidence in the record and is precisely what the Council instructed the Commission to reconsider on remand.

The Appellant claimed that the Commission did not adequately consider this project, but the record shows that it did. The record in this case is voluminous. There was a lengthy application which contained information concerning property ownership, plots, maps, developer information and more.

3. The Record Demonstrates the Application Conforms to the County Code

Mr. Bartley argues that neither the Planning and Zoning Director or staff checked the preliminary plat to ensure conformity with the applicable County zoning and subdivision regulations. First, by not raising this issue below, Mr. Bartley is barred from asserting it on appeal.

Second, Mr. Bartley's argument is not supported by the record. The record is replete with evidence contrary to this argument. In its January 11, 2022 letter, the Department staff reviewed the Application and provided comments, each of which were addressed by Schell in writing prior to the public hearing, and were available for the Commission's consideration at the public hearing.

The Commission's Response further outlined numerous ways in which the Plan followed the County Code. These were considered by the Commission on remand as part of the record.

In his Reply, Mr. Bartley raises a new argument that the easements and grading plan were not properly addressed by the Commission, because they were not included on the Preliminary Site Plan. This argument, again, was not raised by Mr. Bartley below and, therefore, it is barred on appeal. However, it is important to note that these items will be part of the Final Site Plan. In fact, Mr. Bartley acknowledges that Condition S. mandates that the Final Site Plan contain a grading plan. Condition S also states that no building permit will be issued without a grading plan and, no certificates of occupancy will be issued without a grading certificate showing compliance.

4. The Wetlands Were Properly Considered

Mr. Bartley next argues that the wetlands were not properly considered, and that the lot design will disturb "upwards of 25 acres of non-tidal wetlands". Mr. Bartley's

interpretation of both the subdivision plan and the applicable law is incorrect. The record includes information pertaining to Wetlands Delineation as to federal wetlands which are under the U.S. Army Corps of Engineers' jurisdiction. The isolated low areas identified by the U.S. Army Corps of Engineers do not meet the DNREC's definition of wetlands and, therefore, do not meet the County's definition of wetlands and are otherwise unregulated.

Low wet areas do not, in and of itself, constitute regulated wetlands. There are no DNREC Wetlands on this site. There are, however, 5.65 acres of federal wetlands which the Commission specifically protected by denying the "bonus density lots" which were originally located adjacent thereto. While there are regulated non-tidal wetlands on this site, all of the proposed lots will be configured outside of those regulated wetlands, as well as the non-regulated non-tidal wetlands that meet the definition by DNREC consistent with the County Code. There will also be 50-foot buffer from the non-tidal jurisdictional wetlands, which is twice the Code's 25-foot buffer requirement.

Finally, Condition B expressly provides that, "No lots shall contain any Federal or State wetlands. All Federal or State wetlands shall be clearly shown on the Final Site Plan."

5. The Density Was Accurately Calculated

Mr. Bartley has raised an objection to the density calculation. However, this issue was not raised below and, therefore, is barred on appeal.

That being said, Mr. Bartley's density calculation is erroneous. Because it is located in a Coastal Area, Coral Lakes falls under Section 115-194.3C. which uses the "density of the underlying zoning district for developments using central wastewater collection and treatment systems" with the "allowable density" being determined based on the "lot area and the area of land set aside for common open space or recreational use but shall exclude any area designated as a tidal tributary stream or tidal wetlands by §115-193." Coral Lakes is located in an AR-1 Zoning District which permits two units per acre.¹ The site contains a total of 152.34 acres. Because there are no tidal tributary stream or tidal wetlands, the total acreage is multiplied by 2 which is an "allowable density" of 304 units.

6. The Appeal Fee is Not Subject to Council's Jurisdiction.

Mr. Bartley has raised an issue as to the appeal fee charged in this matter under Ordinance # 2868. On August 23, 2022, Mr. Bartley filed suit in the Court of Chancery captioned, Terrance Bartley v. County Council of Sussex County, Delaware, C.A. No. 2022-0743, challenging the appeal fee. As such, this is not the proper venue for deciding this issue.

¹ Sussex County Code, §115-25B(3).

7. Mr. Bartley's Assertion of Future Rights Concerning the Final Subdivision Plan Has No Bearing on this Appeal.

Mr. Bartley makes an assertion that, under 9 Del. C. §§ 6810 and 6811, he has the ability to appeal the Final Site Plan once it is recorded. This argument has no bearing on the current appeal and, therefore, does not warrant discussion.