



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Citizens' Coalition, Inc., et al. v. Sussex County
Council, et al.*, Civil Action No. 2218-S

Dear Counsel:

Before the Court is a petition to invalidate a zoning map amendment ("rezoning") by the Sussex County Council ("SCC") for land owned by Defendant Country Life Homes, Inc. ("Country Life").¹ The rezoning permits construction of 185 units of

¹ The Court of Chancery has jurisdiction to entertain petitions challenging rezonings. *E.g., Shevock v. Orchards Homeowners Ass'n, Inc.*, 621 A.2d 346, 349 (Del. 1993).

multifamily condominiums on land that was formerly zoned for less than 60 single-family homes. For the reasons stated below, the Court will deny the petition.

I. BACKGROUND

On November 16, 1998, when Country Life acquired the deed to tax parcel 3-34-12-00-56-00 (the "Parcel") for 30.63 acres in Sussex County, it was zoned AR-1 (Agriculture Residential). This zoning designation permitted the development of one single-family home per 20,000 square foot lot.² The Parcel is bordered by a single-family residential development, a golf course and active farmland. There is a property with multi-family dwellings approximately one half mile from the Parcel.³ The Parcel is within the Development District of the Comprehensive Plan for Sussex County.

Country Life filed a previous application that proposed a development with 214 units and a B-1 commercial section. On the current application, Country Life and its principal, Defendant Elmer Fannin ("Fannin"), sought a rezoning to develop the property as HR-RPC (High Density Residential with a Residential Planned Community overlay)⁴ with 193 units. The current application therefore seeks a less intense usage than the earlier one.

² Code of Sussex County Delaware § 115-25 (Zoning: Height, Area and Bulk Requirements).

³ That parcel is zoned MR (Medium Density Residential).

⁴ Code of Sussex County Delaware Ch. 115 (Zoning), Arts. VII (HR-1 and HR-2 High Density Residential Districts) & XVI (RPC Residential Planned Community District).

The application to amend the Comprehensive Zoning Map was presented to the Planning and Zoning Commission of Sussex County (the "Commission") on December 13, 2001.⁵ The Commission heard testimony and comments from the Delaware Department of Transportation ("DeIDOT") and the Office of State Planning Coordination which recommended that the application be denied. The Commission also heard from Country Life's attorney, its land planner, and Fannin recommending that the application be approved. The Commission recommended that SCC deny the application as out of character with the neighborhood,⁶ with the individual members noting their concerns.⁷

The rezoning application came before SCC on January 8, 2002. Similar testimony was presented. SCC also held the record open for thirty days for additional comments before making a decision. On March 19, 2002, after debate on the application among the Council members, SCC voted 3-1 to approve it. Only one council member dissented, but even he stated that he would have approved the application if it were for 125 units rather than 185, as the majority approved. In support of its action, SCC read twenty-nine findings of fact⁸ and fifteen conditions into the record. SCC stated that the Parcel is in

⁵ *Sussex County Planning and Zoning Commission Hearing, Change of Zone No. 1454 (Dec. 13, 2001) included in Petitioners' Opening Brief ("POB") Appendix ("App.") at 135-217.*

⁶ *Id.* at 216-17.

⁷ *Id.* at 179-95.

⁸ Petitioners criticize SCC's use of the developer's findings of fact. There is no evidence, however, that any alternative findings of fact were submitted to SCC.

the Development District, the application was thoroughly reviewed and modified in certain respects, and the application is from a local developer and should be granted.⁹

Petitioners later filed this action to invalidate the rezoning.

II. STANDARD OF REVIEW

Rezoning decisions are presumptively valid and will not be set aside unless clearly shown to be arbitrary and capricious.¹⁰ The party challenging a rezoning has the burden of rebutting the presumption of validity and showing that the rezoning is arbitrary and capricious.¹¹ If the reasonableness of a zoning change is fairly debatable, the judgment of the County Council must prevail.¹² The Court's role is limited to reviewing the record to determine whether SCC's decision is supported by evidence such that it cannot be deemed arbitrary and capricious.¹³ The relevant inquiries are: (1) whether SCC held an appropriate hearing; (2) whether SCC considered the elements that they are required to consider by statute; and (3) whether substantial evidence supported SCC's decision.¹⁴

More importantly, as discussed *infra*, pp. 6-15, the record demonstrates that SCC acted rationally in considering and adopting the findings of fact.

⁹ *Sussex County Council Hearing Tr.* (Jan. 8, 2002) POB App. at 218-341, (March 19, 2002) POB App. at 342-97.

¹⁰ *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986); *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612, 614 (Del. 1971).

¹¹ *Tate*, 503 A.2d at 191.

¹² *Id.*

¹³ *Concerned Citizens of Cedar Neck, Inc. v. Sussex County Council*, 1998 WL 671235, at *5 (Del. Ch. Aug. 14, 1998).

¹⁴ *Hudson v. County Council of Sussex County*, 1988 WL 15802, at *5 (Del. Ch. Feb. 24, 1988).

III. ANALYSIS

Petitioners advance two arguments for setting aside the rezoning: (1) approval of the application to rezone the Parcel was arbitrary and capricious; and (2) SCC failed to comply with Delaware Zoning Statutes and the Comprehensive Plan. Petitioners' second argument simply addresses the second prong of the three-part analysis established in *Hudson*. The record demonstrates that SCC's decision to rezone complied with Delaware Zoning Statutes and the Comprehensive Plan and was reasonably based on findings of fact and conditions that were supported by evidence presented at a proper hearing. Thus, it was not arbitrary and capricious.

A. SCC Held a Proper Hearing

The record reflects that SCC held a hearing on January 8, 2002 at which it heard comments from the Commission, the Office of State Planning Coordination, DelDOT, surrounding landowners and the developer.¹⁵ Petitioners do not dispute the validity of the hearing.

B. SCC's Decision Complies with Delaware Zoning Statutes

Petitioners presented a laundry list of Delaware Zoning Statutes that they claim SCC violated by approving the rezoning. Petitioners' arguments, however, focus only on a Memorandum of Understanding between SCC and DelDOT and alleged failures to conduct a Traffic Impact Study ("TIS") and to comply with the Comprehensive Plan.

¹⁵ The complete transcript of the hearing appears in POB App. at 218-341.

Petitioners contend that the rezoning violates 9 *Del. C.* § 6962. That section provides “the County government, through its designated planning agency, shall establish an agreement with [DeIDOT] to provide a procedure for analysis by DeIDOT of the effects on traffic of each rezoning application.” That agreement is the Memorandum of Understanding for Land Development and Coordination between DeIDOT and SCC of April 1998, amended June 1998 (“MOU”). The MOU required a level of service (“LOS”) at the intersection of Sussex Road 275 and State Road 24 of D or better.

DeIDOT plays an advisory role in zoning decisions.¹⁶ DeIDOT recommended denial of the original application in a letter dated November 20, 2000 because the LOS on the roads in the vicinity of the Parcel at the intersection of Route 24 and Road 275 was insufficient in that it would decline to an unacceptable LOS E.¹⁷ Thereafter, DeIDOT changed course, indicating in comments on other projects that with minor changes that intersection could operate at an acceptable LOS D, in which case the proposed rezoning would not violate the MOU.¹⁸ These comments were part of the record considered by SCC.

SCC specifically addressed the MOU, and in Findings of Fact 19 and 23, quoted below, found that the development would comply with the MOU.

¹⁶ 29 *Del. C.* § 9220; *Cedar Neck*, 1998 WL 671235, at *6. *See also* POB App. at 69.

¹⁷ POB App. at 69-74.

¹⁸ POB App. at 84, 85.

19. Although DelDOT recommended in its November 20, 2000 letter that this application be denied, it stated that the recommendation was based on factors beyond the applicant's control; specifically, they were concerned about encouraging development that may create more traffic in an area they had identified as operating at unacceptable levels of service in summer peak hours. At the time of DelDOT's letter, the applicant was proposing 214 units, whereas applicant has now lowered its density request to 193 units. However, in a letter report dated October 10, 2001 on the Henlopen Landing (Knapp property) project, also located on Plantations Road [Sussex Road 275], DelDOT stated that in regard to the Route 24, Plantations Road and Warrington Road intersection, an acceptable LOS D could be achieved by optimizing signal phase timings as recommended in the TIS for the Henlopen Landing project and that if such signal timing changes were made, the intersection would operate at acceptable LOS D through the 2003 summer peak traffic season. DelDOT's November 20, 2000, letter also stated that the County should require as part of any approval of the project the following: (1) space for a 50 foot right of way through the property for future construction of a north to south local road (Grid Road) with the location subject to DelDOT review and approval in the site plan review process, (2) the dedication of either rights-of-way or easements at and around the site entrance such that the entrance is built on Road 275, others can subsequently reconnect it to a future street without obtaining further easements for rights-of-way from the subject property, (3) the design and construction of the site entrance in a manner that will accommodate bicycle traffic on Road 275, (4) the design and construction of sidewalks along the projects internal streets.

23. Approval of the project will comply with the Memorandum of Understanding for Land Development and Coordination between Sussex County Council and DelDOT dated June 1988 in that it will not cause the threshold level of service to be exceeded.

As recited in Finding of Fact 19 DelDOT suggested the imposition of certain conditions on the development if it ultimately were to be approved.¹⁹ SCC addressed

¹⁹ POB App. at 69-74.

DelDOT's concerns and imposed Conditions 4, 5 and 10, among others. Those conditions state:

4. As recommended in DelDOT's letter dated November 20, 2000, the applicant shall be required to allow space for a right of way through the property for the future construction of the north south local road in the event such road is subsequently constructed by DelDOT, with the location of the right-of-way being subject to DelDOT review and approval in the site plan process for the construction phase that includes the proposed right of way.

5. As recommended in DelDOT's letter dated November 20, 2000, the applicant shall be required to include pedestrian walkways along the projects internal streets by constructing a pedestrian walkway/bikeway along at least one side of each street in the community.

10. All entrance improvements required by DelDOT shall be completed by the applicant.

The record shows that SCC considered DelDOT's recommendations and required concessions accordingly.

Petitioners argue that the rezoning violates 9 *Del. C.* § 6962(4) because the applicant failed to obtain a TIS. Section 6962(4) requires SCC to "*consider* the effects of existing traffic, projected traffic growth in areas surrounding a proposed zoning reclassification and the projected traffic generated by the proposed site development for which the zoning reclassification is sought." DelDOT did not conduct a new TIS for this specific development. DelDOT did, however, have TISs that it found to be sufficient for

evaluating the impact of the development.²⁰ The existing TISs related to the same intersection for the nearby developments of Sea Chase II and Henlopen Landing.²¹ SCC took these TISs into consideration in approving the rezoning and imposed conditions in light of DelDOT's concerns.

These considerations are reflected in Findings of Fact 8, 18, 19 and 23. Findings 8 and 18 state:

8. The site is in a Developing Area and is consistent with development patterns recognized in the State of Delaware's proposed strategies for State Policies in Spending and is located in a multi-modal investment area under DelDOT's Statewide Long Range Transportation Plan.

18. Although a letter from DelDOT dated October 16, 2000 recommended a [TIS], a subsequent letter from DelDOT dated November 20, 2000 revised the earlier letter by stating that the Department had enough information from a [TIS] from another project and that the [LOS] . . . has remained at [LOS] "D" and that it is not likely to change soon and that the Department believes that the construction of the proposed Grid Road would be a benefit to the people who live, work, shop and recreate in the block formed by Route 1, Route 24, Roads 275 and 283 and that the proposed Grid Road would allow residents of the proposed project to avoid the Route 24 and Road 275 intersection on trips where they otherwise could not do so in a practical way.

Findings of Fact 19 and 23, quoted earlier, reflect SCC's consideration of whether the LOS would be exceeded, and the MOU. SCC noted that the proposed development had been reduced in size since DelDOT's November 20, 2000 letter recommending denial

²⁰ POB App. at 69-74 ("we feel we have enough information from a TIS for another project to offer our recommendation now.").

²¹ Petitioners do not contend that DelDOT had an obligation to perform a separate TIS for this development. Defendants' Opening Brief ("DOB") at 27. In fact,

and that DelDOT had more recently approved of a nearby development with minor changes to signal phasing. Based on these and other facts referred to in its findings, SCC found that the development at issue in this case would not *cause* a violation of the MOU. These Findings of Fact demonstrate that SCC *considered* DelDOT's comments and the relevant TISs in their decision to rezone the Parcel.

SCC found that the proposed development would provide economic benefits to the citizens of Sussex County. Finding of Fact 14 states:

The development will provide a substantial direct economic impact to Sussex County in terms of jobs in the construction and real estate industries, sewer fees and usage charges, building permit and review fees, transfer taxes, property taxes and school taxes and will provide a substantial secondary economic impact to area business through future building and ground maintenance.

SCC found further benefits to the citizens of Sussex County from the Grid Road.²² SCC took these benefits into account when it decided to approve the rezoning notwithstanding the LOS issues that it faced.

Petitioners contend that “[SCC] misplaces the mitigation recommendations as a form of acceptance by commenting agencies.”²³ The record does not support Petitioners' argument. On the contrary, it indicates that SCC dutifully considered the recommendations of the commenting agencies and discussed them in the Findings of Fact

DelDOT does not have such an obligation. *Deskis v. County Council of Sussex County*, 2001 WL 1641338, at *5 (Del. Ch. Dec. 7, 2001).

²² Finding of Fact 18, *supra*, p. 9.

²³ Plaintiffs' Reply Brief (“PRB”) at 11.

and Conditions.²⁴ More importantly, Petitioners' argument overlooks the fact that the Delaware Zoning Statutes vest final decision-making authority in SCC.²⁵

Petitioners also contend that the approval fails to comply with the Comprehensive Plan. The Delaware Land Use Planning Act provides for notice and comment on proposed land use actions. Those who provided comments included the Office of State Planning Coordination, which is responsible for transmitting the coordinated comments of state agencies, including its own, to the local jurisdiction.²⁶ The Office of State Planning Coordination recommended that the application be denied, but left room for approval.²⁷ In part, its objection was based on the LOS concerns raised by DelDOT.²⁸ Those concerns were addressed above. SCC demanded concessions from the developer regarding DelDOT's other concerns as well. The Office of State Planning Coordination also expressed concern about the type and size of the development in an area of considerable development. The approved final development of 185 units was

²⁴ See generally POB App. at 218-397.

²⁵ 29 *Del. C.* § 9220(a); *Cedar Neck*, 1998 WL 671235, at *6 (rejecting argument that SCC's approval of an ordinance over the objection of the Office of State Planning Coordination was in and of itself unreasonable). Effective February 14, 2004, 29 *Del. C.* §§ 9201 to 9235 were superseded by new §§ 9201 to 9206. These changes do not affect this case. The new 29 *Del. C.* § 9206, like former § 9220(a), confirms that the final decision-making authority over proposed land use planning actions remains with the local jurisdictions.

²⁶ See 29 *Del. C.* §§ 9215, 9218, 9219. SCC retains the ultimate decision making power. 29 *Del. C.* § 9220.

²⁷ See POB App. at 66-67 ("If the County does approve this application, the State asks that the County require the developer to follow the requests of DelDOT.").

²⁸ POB App. at 66.

approximately 14% smaller than the originally proposed 214 unit plan, and less than the 193 units sought in the application presented to SCC in January 2002. It also included additional provisions for open space, landscaping, and recreational space. These actions by SCC contradict Petitioners' argument that SCC failed to *consider* the Office of State Planning Coordination's concerns as required by 29 *Del. C.* § 9220.

“The Land Use Planning Act does not transfer zoning authority from local to state control. While the Act provides for notice and comment by the various State agencies on proposed land use actions, ‘the final decision-making authority’ remains with the local jurisdiction.”²⁹ The Commission and SCC were advised of and considered the comments of the state planning coordinator, which are part of the record. After considering those and the other comments presented, SCC determined that the site was appropriate for rezoning and that the proposed rezoning complied with the Land Use Plan. Comments received from the state agencies in accordance with Chapter 92 of Title 29 are not binding on SCC. Thus, SCC's approval of the rezoning over their objection does not prove in and of itself that SCC's decision was unreasonable or irrational.³⁰

Finally, Petitioners contend that “[i]t is inexplicable that the ‘findings of fact’ presented to the County [by the applicant] do not even resemble the findings of the various commenting agencies, especially the County's own Planning and Zoning

²⁹ 29 *Del. C.* § 9220(a).

³⁰ *Cedar Neck*, 1998 WL 671235, at *6.

Commission.”³¹ The Commission plays only an advisory role in rezoning decisions.³²

SCC’s approval over the recommendations of the Commission and the Office of State Planning Coordination does not prove that SCC’s decision was unreasonable or irrational.³³ The record supports the conclusion that SCC considered the recommendations of each of those bodies. SCC placed conditions on the approval of the rezoning that reflect the local and state agency concerns.³⁴

C. Substantial Evidence Supported SCC’s Decision

SCC’s decision was supported by substantial evidence as demonstrated by the extensive record provided by Petitioners. Although some of the comments from the state agencies were negative, they left room for approval if certain conditions were required

³¹ POB at 33. Petitioners rely on *Deskis*, 2001 WL 1641338, at *6, for the proposition that it is unreasonable to rely on the developer’s findings of facts and grant an application over a recommendation of denial by state agencies. While it may be reasonable (that is, not arbitrary and capricious) to rely on state agency recommendations and studies over anecdotal evidence when making land use decisions, *id.*, the inverse is not necessarily true. It is not *per se* unreasonable for SCC, the ultimate decision making body, to rely on a developer’s findings of fact and approve a rezoning over a recommendation of denial by state agencies. This is particularly true where, as here, the state agencies left room for approval if conditions addressing their concerns were imposed on the development, and SCC made its approval subject to many of those conditions.

³² *Cedar Neck*, 1998 WL 671235, at *6.

³³ *Id.*

³⁴ The situation presented in this petition is distinguishable from that presented in *Green v. County Planning & Zoning Comm’n*, 340 A.2d 852 (Del. Ch. 1974). In *Green*, Vice Chancellor Marvel granted a *preliminary injunction* against the rezoning that eventually permitted the construction of Sea Colony where the plaintiffs made a showing that the county council had failed entirely to consider

for the proposed development. SCC addressed these concerns through the conditions it imposed on the development. Furthermore, the approved final development had undergone significant changes from the initial application as a result of the approval process. Petitioners largely ignore these conditions and changes. The required conditions and changes, however, reasonably could be expected to ameliorate certain concerns expressed by those opposed to the project.

The initial application, which SCC rejected, included a B-1 commercial section and 214 residential units. The final application was entirely HR-RPC and proposed 193 units. Ultimately, the Council approved a 185-unit development, and the project does not include any B-1 commercial section. Additionally, the applicant made significant concessions to accommodate concerns raised by the state agencies, relating to setbacks, open space, recreational areas, and mitigation of traffic concerns, among other things.³⁵

Petitioners rely heavily on the comments of a single councilman. His commentary is illuminating, but it must be viewed in context. SCC approved the application by a 3-1 vote, subject to a number of conditions. Only one councilman voted to deny the application, and even he stated that he would have approved it at 125 units. Petitioners'

the requirements of 9 *Del C.* § 6904. In this case, the record shows that SCC did consider those requirements in reaching its decision.

³⁵

During the review of the initial application, there were concerns about sewer connections and the availability of water. The local water utility, Tidewater Utilities, had addressed those concerns by the time SCC considered the final application. *See* Tidewater Ltrs. POB App. at 111, 133-34 *and* Country Life's Ltr.

reliance on the lone dissenter is not persuasive. It certainly does not justify this Court's second-guessing SCC's collective decision.

The Court finds the findings of fact and the conditions SCC adopted in approving the rezoning to be reasonable and rationale. While Petitioners and others may disagree with them, SCC's conclusions are, at a minimum, fairly debatable. Having reviewed the lengthy Appendix provided by Petitioners, the Court cannot conclude that SCC's decision was arbitrary and capricious, or as some courts have described the applicable standard, "dependent on the will alone" and "not done according to reason."³⁶

IV. CONCLUSION

SCC, at a proper hearing, considered the elements that it was required to consider by Delaware law in making a rezoning decision. The evidence of record provides substantial evidence to support the decision that SCC reached. Because Petitioners have failed to show that the rezoning was arbitrary and capricious, the Court denies their challenge to the rezoning. Defendants shall submit an appropriate order upon notice.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

POB App. at 127-32. *Cf.* Petitioners' Expert Reports POB App. at 112-21, 122-25, 126.

³⁶ The fact that another party might have acted differently after reviewing the same evidence is not a reason to conclude government acted arbitrarily or capriciously. *Cedar Neck*, 1998 WL 671235, at *4. *See also Concord Towers Inc. v. McIntosh Inn of Wilmington, Inc.*, Del. Ch., C.A. No. 15656 (July 22, 1997).