



Department of Land Use

**NEW CASTLE COUNTY PLANNING BOARD
NOTICE OF DECISION**

REFERENCE: Application 2008-0596-SA DECISION FILED: January 8, 2009

APPLICANT: Patz Helmick Whitehead Partnership
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Wilmington, DE 19899

PUBLIC HEARING DATE: November 6, 2008 DATE OF DECISION: November 18, 2008

REQUESTED: Applicant filed an Administrative Appeal seeking reversal of a decision of the Department of Land Use dated June 26, 2008.

The Planning Board (the "Board") may reverse the decision of the Department of Land Use (the "Department") if it finds that the Department made an error in its interpretation of the applicable sections of the Unified Development Code ("UDC" or the "Code") or if it finds that the Department's findings and conclusions were not the result of an orderly and logical review of the evidence and the applicable provisions of the Code, according to Section 40.31.512 of the UDC. The Board received and reviewed submissions from the Applicant and the Department.¹ The public hearing before the Board on this

¹ Submissions to the Board on this appeal included:

1. Opening Letter Brief dated September 12, 2008, from Applicant's counsel, with the following attached exhibits:
 - Exhibit A, Application/ Exploratory Sketch Plan,
 - Exhibit B, Department of Land Use Exploratory Sketch Plan review report dated March 24, 2008,
 - Exhibit C, letter dated April 9, 2008 to Steve Faux from Apex Engineering,
 - Exhibit D, letter dated April 22, 2008 to Apex Engineering from David Culver,
 - Exhibit E, letter dated June 26, 2008 to Wendie Stabler, Esq., from Charles Baker,
 - Exhibit F, 1968 Record land development plan for Harmony Site,
 - Exhibit G, 1972 Record land development plan for Harmony Industrial Site,
 - Exhibit H, printout of Parcelview details listing 8 previously recorded minor land development plans for Harmony Industrial Park, and
 - Exhibit I, emails dated May 8, 2008 to and from Wendie Stabler, Esq., and George Haggerty;
2. Answering Memorandum dated September 25, 2008 from the Department's counsel, with the following attached appendices:
 - Appendix A, UDC Section 40.31.300, definition of 'minor land development',
 - Appendix B, UDC Section 40.31.512, appeal standards and County Council consent,
 - Appendix C, UDC Section 40.31.380, general considerations when rendering,
 - Appendix D, copy of *Eastern Shore Environmental, Inc. v. Kent County Dept. of Planning*, 2002 WL 244690 (Del.Ch.),

appeal was held on November 6, 2008 (the "Hearing"). Both the Department and the Applicant were represented by counsel. Carol Ohm, P.E., of Apex Engineering, Inc., also appeared on behalf of the Applicant. The Board voted on the appeal in its business meeting on November 20, 2008 (the "Business Meeting"). All Board members were present at the Hearing and the Business Meeting. As discussed below, the Board votes to grant the appeal on the basis that the Department made an error in its interpretation of the UDC when it determined that the Applicant's submitted exploratory sketch plan must be processed a major, rather than a minor, land development plan.

The Applicant appeals a final decision of the Department that is contained in a letter dated June 26, 2008 (the "Decision Letter"), in which it determined that the Applicant's submitted exploratory sketch plan (the "Application") must to be processed as a major land development plan, as opposed to a minor land development plan. The Application proposed an approximately 50,630 square foot warehouse to be constructed at the Harmony Industrial Park, Tax Parcel No. 09-016.00-035, Lot No. 13-B-2-A-3. In referencing the *New Castle County Unified Development Code* ("UDC"), Section 40.33.300, the Decision Letter stated, in pertinent part:

[I]n order for an industrial application to be processed as a minor development plan it must; [sic] 1) have been created by a previous major land development plan, 2) the plan must have established lots, 3) the plan must have depicted the overall limits of development and, 4) no special studies should be required for approval.

In this case, there is a previous plan, the plan established the lots and there are no special studies required for the application. But, the previous plans failed to establish the overall limits of development. Instead, the purpose of the major plan of the Harmony Industrial Site...was to dedicate Ruthar Drive bisecting a 118.6 acre tract of land while resulting in a 45.274 acre remnant, a 73.328 acre remnant, two 2-acre lots, and one 4-acre lot. No development was proposed by the plan, no internal infrastructure was proposed, and the issues of traffic, stormwater management, sewerage, or any other land use impact were not evaluated. The subject 3.75 acre lot [in this Application] was created after a series of minor land development plans further subdivided the original 45.274 acre parcel into seven separate lots. As a consequence, the plan must be processed as a major land development plan.

The Decision Letter, at 2.

Both the Applicant and the Department agree that UDC Section 40.33.300 applies to this Application and, that this UDC section determines whether the Application can be processed as a major or a minor development plan. The parties differ, however, over the

Appendix E, Section 20-3 of 1977 New Castle County Code, defining 'industrial land development';
3. Reply Letter Brief dated September 29, 2008 from Applicant's counsel;
4. Transcript of Planning Board public hearing dated November 6, 2008; and
5. Letter dated November 7, 2008 from Applicant's counsel.

interpretation of certain terminology used in the definition of the term, 'minor land development' in UDC Section 40.33.300. In the general definition section of the UDC, 'minor land development' is defined in this manner:

Minor land development. A plan that proposes one or more of the following:

A. A subdivision of land resulting in five (5) lots or less and not creating new street rights-of-way.

B. Except for single-family dwellings and accessory structures on fee simple lots, land development proposing new buildings or additions one thousand (1,000) square feet GFA or greater, or five thousand (5,000) square feet GFA or greater in the OR, BP, I, and HI zoning districts and meeting one or more of the following criteria:

1. Proposed buildings less than twenty thousand (20,000) square feet GFA.

2. For lots containing at least twenty thousand (20,000) square feet GFA of existing development, any number of expansions are permitted (including expansions in excess of twenty thousand (20,000) square feet GFA), provided the cumulative total of all the expansions does not exceed fifty thousand (50,000) square feet GFA. Any subsequent plan submission proposing a new building or expansion exceeding fifty thousand (50,000) square feet shall be reviewed as a major plan.

3. *In any OR, BP, I or HI zoning district on lots containing at least fifty thousand (50,000) square feet GFA of existing development, any size expansion of an existing industrial or manufacturing use provided no TIS is required by DeIDOT.*

4. Apartment or multi-family development of less than ten (10) dwelling units.

5. *Development that would be considered a major land development in industrial or office parks for which a previous record major plan has been recorded to establish lots and otherwise depict the overall limits of development provided that no special studies are required for approval; e.g., TIS, CNA, environmental impact assessment report, floodplain application, WRPA, subsidence. The project must be such that any issues or concerns are minor in nature and can be evaluated without the necessity of TAC review.*

6. Expansions of existing institutional facilities provided that no special studies are required for approval; e.g., TIS, CNA, environmental impact assessment report, floodplain application, WRPA, subsidence. The project must be such that any issues or concerns are minor in nature and can be evaluated without the necessity of TAC review.

New Castle County UDC Section 40.33.300 (emphasis added).

In the Board's view, this appeal turns on whether the Department used the correct interpretation of Subsections (B)(3) or (B)(5) of the definition of minor land development plan as it applies to the processing of this Application.² Subsection (B)(3) of the definition of minor land development includes the phrase, "[i]n any OR, BP, I or HI zoning district on lots containing at least fifty thousand...square feet of GFA..." *New Castle County UDC Section 40.33.300*. The drafters of the Code used the plural word, "lots"; not the singular form, "lot." A strict, literal interpretation of the Code supports the argument that the drafters of the UDC intended that the term "lots," as applied to the instant scenario, would refer to the entire industrial park development, and that such subsection would apply to precisely the proposed development submitted by the Applicant. It also could be argued, however, that the word "lots" in that subsection was intended to be applied in a more general way, and the use of the plural form was more of an implicit recognition that this Code subsection would be applied to many lots over time.

The UDC contains the following instruction to this Board: "When interpretation of this Chapter is required in rendering a decision, the legislative intent of County Council shall be used to guide all decisions." *New Castle County UDC Section 40.31.380*. Neither the Applicant nor the Department offered the Board any dispositive argument on the significance of use by County Council of the plural term, "lots," in Subsection (B)(3). The Board recognizes that the Subsection (B)(3) is ambiguous and decides, therefore, as required by Delaware law, that the Department should have construed the subsection in favor of the land owner. *Cardillo v. Council of South Bethany*, 1991 WL 113627 (Del.Super.1991); *Commissioners of Bellefonte v. Coppola*, 1982 WL 17851 (Del.Ch.); *Mergenthaler v. State*, 293 A.2d 287 (Del. 1972). See also *McKinney v. Kent County Bd of Adjustment*, 2002 WL 1978936, at *4 (Del.Super.); *Cheswold Aggregates, LLC v. Bd. of Adjustment*, 2000 WL 33108801, at *2 (Del.Super.).

The parties to this appeal put much effort into argument over the Department's interpretation of the phrase, 'overall limits of development,' and opined that the interpretation of that phrase is critical in determining whether the Application can be processed as a minor land development plan. If the previously approved and recorded plans for the Harmony Industrial Site defined the 'overall limits of development' for the purposes of the Application, it can be processed as a minor land development plan pursuant to the Subsection (B)(5) of the definition of minor land development plan in UDC Section 40.33.300.

Both the Applicant and the Department argued that the UDC contains no definition of the phrase, 'overall limits of development.' Further, both parties argued that the manner in which the Department has historically applied the phrase 'overall limits of development' to other applications has been a matter of case-by-case interpretation and analysis of the

² The Applicant also argued that because the Department's decision allegedly violated the Applicant's constitutional rights under the equal protection clause, it should be reversed as it was not the result of an orderly and logical review of the evidence. In response, the Department interposed a jurisdictional objection, and asserted that this Board did not have the authority to interpret or apply constitutional law. This Board voted to grant the appeal on other grounds (*to wit*, that the Department made an error of law in its interpretation of the UDC) and, therefore, did not deliberate or vote on the merits of the Applicant's constitutional violation argument. As such, the Department's objection was rendered moot.

relevant facts and circumstances. As such, that term has been subject to interpretation and, on one occasion in the history of the Harmony Industrial Site, may have been applied in error.³

In UDC Section 40.33.300, the term 'developable land' is defined as "[a]ll land within the boundaries of any tract proposed for development except for land which is located within the existing rights-of-way of any public or private road or any overhead utility line, floodplains, including land continuously covered with water, wetlands and prohibitive steep slopes." *Id.* The word 'development' is defined in the same UDC Section as "[a]ny action covered by Section 40.01.110." UDC Section 40.01.110 covers types of development, and Subsection (C) states:

Any division of land or land development whether for sale or lease. Whether by metes and bounds, subdivision, or land development, all development designs and layouts shall comply with all regulations contained in this Chapter.

New Castle County UDC Section 40.01.110(C).

The Application included a plan or drawing that depicts the metes and bounds of the project. (Such plan is attached to the Applicant's September 12, 2008 submission to the Board, marked as Exhibit A, with reference no. 05129000EXP.) It is undisputed that the Application included a plan with metes and bounds that contain sufficient specificity so as to enable the parcel to be assessed and charged for the applicable real estate taxes. Further, it is undisputed that previous plans had established lot lines. Indeed, in its Decision Letter, the Department stated that "a previous plan...established the lots." The question is whether these facts are sufficient to satisfy the definition of the term, 'overall limits of development.' The UDC, however, is silent as to the definition of the term. Although the UDC requires compliance with the term, 'overall limits of development,' both the Applicant and the Department agree that the UDC does not provide a clear definition of the term.

As stated above, the UDC contains the following instruction to this Board: "When interpretation of this Chapter is required in rendering a decision, the legislative intent of County Council shall be used to guide all decisions." *New Castle County UDC Section 40.31.380.* Neither the Applicant nor the Department, however, could provide the Board with any guidance regarding County Council's legislative intent when it used the term, 'overall limits of development.' When County Council adopted UDC Section 40.33.300, such adoption was part of a lengthy ordinance, and the legislative history does not include any analysis or discussion that offers additional insight as to a definition of 'overall limits of development.'

It is well-settled Delaware law that "undefined words in a statute 'should be given their ordinary, common meaning,'" *McMillan v. State*, 2002 WL32054600, at *2 (Del. Super. 2002), *citing Coastal Barge Corp. v. Coastal Zone Indust. Control Bd.*, 492 A.2d 1242, 1245 (Del. 1985), and the "plain meaning" of a statute will control unless the statute is ambiguous.

³ In 1999, the Department processed a plan for parcel 30 of the Harmony Industrial Site as a minor development plan. This 1999 plan covered the development of a parcel that was depicted as a portion of Parcel 13 on the 1972 record major development plan and is adjacent to the Application parcel. The 1999 plan was very similar to the current Application. The Department contends that it erred when it processed the 1999 plan as a minor land development plan and that the 1999 plan should have been reviewed as a major land development plan.

Id. “Where a statute is unambiguous and there is no reasonable doubt as to its meaning, the Court must give effect to its literal meaning.” *Tomei v. Sharp*, 902 A.2d 757, 767 (Del.Super. 2006); *see also Hudson Farms v. McGrellis*, 620 A.2d 215, 216 (Del. 1993). On the contrary, “[a] statute is ambiguous if it ‘is reasonably susceptible of different conclusions or interpretations.’” *McMillan, supra*. Especially where the statute impacts a common law right (such as an interest in real property), the statute must be strictly construed. *See Cardillo v. Council of South Bethany, supra*. The Delaware Court of Chancery ruled that because zoning ordinances “[a]re in derogation of one’s common law right to use [one’s] property as [one] sees fit, they must be construed in case of doubt in favor of the unrestricted use [sic] of the land.” *Id., supra; Commissioners of Bellefonte v. Coppola*, 1982 WL 17851; *Mergenthaler v. State*, 293 A.2d 287. *See also McKinney v. Kent County Bd of Adjustment*, 2002 WL 1978936, at *4; *Cheswold Aggregates, LLC v. Bd. of Adjustment*, 2000 WL 33108801, at *2. Moreover, when an ordinance operates to deprive an owner of the right to use his property as he sees fit, “[a]ny ambiguity or uncertainty must be decided in favor of the property owner.” *Cardillo, supra*, at *3.

The record before this Board demonstrates that the term, ‘overall limits of development,’ is not defined in the UDC, and that County Council’s legislative intent could not be ascertained. Furthermore, it is clear from the submissions and arguments from counsel that ‘overall limits of development’ in *New Castle County UDC Section 40.33.300(B)(5)* is an ambiguous term and is ‘reasonably susceptible of different conclusions or interpretations.’ Moreover, the application of the plural word, “lots,” as opposed to the singular, “lot,” in *New Castle County UDC Section 40.33.300(B)(3)*, is similarly susceptible to conflicting and/or inconsistent interpretations. As a consequence, and according to Delaware case law, those provisions in the UDC must be interpreted in favor of the landowner or Applicant. The Department failed to do so and made an error of law when it decided that the Applicant must process the Application as a major land development plan, as stated in its Decision Letter. Accordingly, the Applicant’s appeal is granted.

VOTE: Motion to grant the appeal.

**Aye: MacArtor, Maloney, McDowell, McGlinchey, Singer, Udo,
Weinberg, Wilson;
Nay: Anderson.**

Motion carried; Applicant prevails.

PLANNING BOARD OF NEW CASTLE COUNTY

[SIGNED 1/8/09]

Victor Singer
Chairman