

PRICKETT, JONES & ELLIOTT

A PROFESSIONAL ASSOCIATION

11 NORTH STATE STREET
DOVER, DELAWARE 19901

TEL: (302) 674-3841

FAX: (302) 674-5864

http://www.prickett.com

WAYNE N. ELLIOTT
GARY F. TRAYNOR
JOHN W. PARADEE
D. BENJAMIN SNYDER*
VALERIE A. DUNKLE**

* ALSO ADMITTED IN PA
** ALSO ADMITTED IN MD

Writer's E-Mail Address: vadunkle@prickett.com

January 3, 2005

WILMINGTON OFFICE
1310 KING STREET, P.O. 1328
WILMINGTON, DE 19899
TEL: (302) 888-6500
FAX: (302) 658-8111

PENNSYLVANIA OFFICE
217 WEST STATE STREET
KENNETT SQUARE, PA 19348
TEL: (610) 444-1573
FAX: (610) 444-9273

VIA HAND DELIVERY

James J. Galvin, Jr., AICP
Director of Planning and Inspections
City of Dover
City Hall/The Plaza
Dover, Delaware 19901

**RE: Bay Village Conditional Use Application
Response to PLUS Comments**



Dear Mr. Galvin:

The purpose of this letter is to provide your office with the Applicant's responses to PLUS comments submitted by the various state agencies in connection with the above-referenced Application.

Contrary to suggestions made by the Office of State Planning Coordination, the Bay Village Project is not inconsistent with the City's Comprehensive Plan and does not violate the City's MOU with the County and the State.

In correspondence dated September 16, 2004, the Office of State Planning Coordination ("OSPC") advises that it is opposed to the proposed Bay Village project because it is a "clear violation of the existing Memorandum of Understanding dated April 13, 1999, and is inconsistent with Dover's Certified Comprehensive Plan as certified by this office." As any objective review of the City's Comprehensive Plan and the April 13, 1999 Memorandum of Understanding ("MOU") will reveal, however, neither of the State's grounds for opposition to the Bay Village Project hold water.

The Bay Village Project is consistent with the City's Comprehensive Plan.

It cannot be credibly maintained that the Bay Village Project is inconsistent with the City's Comprehensive Plan. To the contrary, for all of the reasons articulated in the Applicant's letter to you dated November 8, 2004, the Bay Village Project is a veritable "poster child" for consistency with the City's Comprehensive Plan.

First and foremost, Bay Village is an affordable senior citizen housing project and its Planned Neighborhood Design (PND) is a conditional use permitted on the subject property under Article 3, Section 24.1(b) of the City of Dover Zoning Ordinance. According to the City of Dover Comprehensive Plan, "[t]he most dramatic trend in Dover's population distribution is the increasing number of residents who are 65 years old and older. The percentage of people over 65 will double by the year 2020. With respect to housing, this population is expected to seek alternatives to the high costs and high maintenance demands of large single family homes."¹ Bay Village will meet this need with housing ranging from apartments to detached cottages located in a carefully designed community. Hence, as the Comprehensive Plan exclaims, "Developments targeting this audience should be embraced!"² Bay Village is thus the very sort of development envisioned and targeted by the City's Comprehensive Plan.

Second, while the subject property is presently zoned for agricultural use, its soils are unsuitable for productive farming. According to PLUS comments provided by DNREC, much of the soil on site is of the Othello and Johnston varieties -- poorly drained soils with severe limitations for agricultural development. One of the purposes of *Livable Delaware* is to protect *valuable* farmland and open space, but the Bay Village site does not contain valuable farmland. The highest and best use of the subject lands, then, would be some sort of development, particularly so given the site's ready access to existing utilities and infrastructure. If, however, the subject property is not developed in accordance with a PND conditional use, then in all likelihood the property will be developed for single family detached dwellings, a first permitted use in the Agricultural zoning district under Article 3, Section 23.2 of the City's Zoning Ordinance -- ironically, the very sort of low density sprawl which *Livable Delaware* is supposed to discourage. It should thus be obvious that granting the proposed PND conditional use for Bay Village will actually *reduce* potential sprawl.

Third, Bay Village is a mixed use community comprised of a variety of senior housing alternatives, on-site health services, retail businesses, and worship and recreational pursuits, all of which increases livability and curtails sprawl. *Livable Delaware* proclaims that "a mix of uses is both more convenient and more cost-effective for taxpayers."³ Furthermore, one of the primary goals of the City of Dover Comprehensive Plan is "to develop and maintain an adequate supply of varying housing types, sizes, and densities that are aesthetically pleasing and located in neighborhoods designed or redesigned to promote convenience, conservation, and access to the greater community."⁴ Bay Village meets all of these goals. Additionally, the proposed Bay Village Project includes 87 acres of open space (39% of the site's total acreage!). Hence, open space will be preserved in accordance with the goals of both *Livable Delaware* and the City's Comprehensive Plan, the latter of which seeks "to ensure that new developments are provided

¹ See the City's Comprehensive Plan at page 136.

² See the City's Comprehensive Plan at page 136.

³ See the attached *Livable Delaware* summary at page 6.

⁴ See the City's Comprehensive Plan at page 138.

with private recreational areas and open space commensurate with the size and nature of the development."⁵

Fourth, more than adequate sewer, electric, and water utilities already exist at the Bay Village site. Another primary objective of the City's Comprehensive Plan is to "[c]ontinue to place highest priority on maintaining existing utilities and community infrastructure."⁶ Obviously, the development of land close to sewer, water, and electric services is easier and less expensive.⁷ Because the proposed Bay Village Project would make use of existing utility infrastructure, the Bay Village Project would promote a desirable, economical use of existing resources. Hence, for all of the foregoing reasons, the Bay Village Project is entirely consistent with both the goals of the City's Comprehensive Plan and the policy objectives of *Livable Delaware*.

The Bay Village Project does not violate the City's MOU with the County and the State.

The Bay Village Project does not violate the City's April 13, 1999 MOU with the County and the State. Setting aside for the moment that the MOU is not a binding agreement of any legal significance or force and instead constitutes nothing more than an expression of public policy preferences⁸, the plain fact of the matter is that approval of the Bay Village Project would not implicate or violate the MOU in any fashion. Here it is critical to recognize that the MOU, by its very own language, does not prohibit any and all development east of SR1 (and indeed, the MOU could not possibly do so without effecting an unconstitutional taking of private property rights). Rather, the MOU merely serves to discourage (rather than prohibit) development east of SR1 by restricting the public funding of additional infrastructure improvements required to support such development.⁹ In essence, then, the MOU simply provides that neither the City, the County, nor the State will pay for any additional infrastructure improvements east of SR1 without the prior consent of all three parties to the MOU. However, the MOU does not prohibit or otherwise prevent the owners of property east of SR1 from developing their lands if they can do so, in accordance with local land use regulations, using their own private funds.

Comments from the Delaware Economic Development Office (DEDO) are similarly flawed.

⁵ See the City's Comprehensive Plan at page 151.

⁶ See the City's Comprehensive Plan at page 86.

⁷ See the City's Comprehensive Plan at pages 137-38.

⁸ In order to constitute a legally binding and enforceable act of the City, the County, and/or the State, the MOU would have to be adopted by resolution or ordinance of the City, by Ordinance of the County, *and* by an act of the General Assembly on behalf of the State. See Section 3 of the City of Dover Charter: 9 Del. C. §4110(h); and Article II, Section 1 of the Delaware Constitution.

⁹ See paragraph 3 of the MOU, which provides that "the State of Delaware has designated the area east of S.R.1 in Kent County as a Limited Growth Area with the intent of *discouraging* costly, sprawling development along S.R.1" [emphasis added].

Comments from DEDO blindly regurgitate the contention of the Office of State Planning Coordination that the Garrison Tract is to be the *only* development east of SR1. No such conclusion can be found within the letter or the spirit of the MOU, however. Rather, the MOU merely serves to carve out the Garrison Tract as an exception to the general rule of policy that neither the City, the County, nor the State will pay for any additional infrastructure improvements east of SR1 without the prior consent of all three parties to the MOU.

DEDO also comments that it does not believe an adult community should be developed across the street from a high technology industrial park. While DEDO admits it is not familiar with adult housing, it did not provide any evidence as to how the adult community would be adversely affected by such a park or vice versa.

Additionally, DEDO states that as the technology park is proposed to employ thousands of people "with the limited infrastructure in the area we believe that all of the infrastructure capacity needs to be dedicated solely to the park." Yet, the Garrison's Technology Park still does not exist, and no development towards such a park has been initiated in the five years since the MOU was signed. The existing infrastructure in place along White Oak Road was constructed long before execution of the MOU, and is currently underutilized. No evidence has been presented to suggest that the existing infrastructure already in place cannot handle both a technology park on the Garrison tract and the proposed Bay Village Project, and even if such a contention were supported by record evidence, the Bay Village Project could certainly provide for any expansion of the existing infrastructure which might be required. Here again it is worth noting, as the City's Comprehensive Plan clearly states, that "[d]evelopment of land close to sewer, water, and electric services is easier and less expensive."¹⁰ The MOU does not state that the existing infrastructure will be dedicated solely to the Garrison's tract, but rather, that in order to discourage development east of SR1, neither the City, the County, nor the State will pay for any additional infrastructure improvements east of SR1 without the prior consent of all three parties to the MOU. As articulated above, however, the MOU is not here implicated because the existing utility infrastructure already in place is sufficient to service to proposed Bay Village Project.

Response to Comments from the State Historic Preservation Office:

The Historic Preservation Office is concerned that "if the subject property is developed as proposed, the rural and agricultural contexts will be diminished, resulting in a diminution of the historic district's significance." The development of this property as proposed is allowed under the City of Dover Comprehensive Plan and the City of Dover Code as a conditional use suitable in an agriculture zoning district. Further, if this land is not developed as a PND with a senior citizen overlay, it will be developed as low density housing allowed by right in this agricultural zoning.

¹⁰ See the City's Comprehensive Plan at pages 137-38.

Bay Village acknowledges the possibility of archeological sites within their property and agrees to comply with any and all laws, or governmental requirements to preserve historic and cultural resources.

Response to Comments from the Department of Transportation (DELDOT):

Responses to the numbered comments given by DELDOT are as follows:

1. Bay Village will apply for a traffic study for this project.
2. Bay Village will review the locations of the proposed entrances as part of the site design phase.
3. Sidewalks will be provided throughout the subject property development. If the Division of Parks and Recreation requires sidewalks along White Oak Road, Bay Village does not object.
4. Bay Village does not object to providing an easement for the future development of a stub street if there is to be future development.
5. DELDOT is concerned that the proposed retirement community occupies the land where part of the service road to connect the Garrison Technology Park to a partial interchange at North Little Creek Road is planned. To date, the owner of the Bay Village property has not been contacted about a service road for Garrison Park on the Bay Village property.
6. The Bay Village site engineer will contact DELDOT's Kent County project manager for the entrance design requirements.

Response to Comments from the Department of Natural Resources and Environmental Control (DNREC):

Soils

The site engineer is aware of the soil type present on the site. Their characteristics will be taken into consideration as the site is engineered and designed.

Wetlands

Regarding wetlands, the developer is prepared to follow the prescribed permitting process(s) that address each regulating authority. A wetland delineation will be conducted that does comply with the methodology established by the Corps of Engineers Wetlands Delineation Manual and will be verified by the Corps of Engineers. All efforts will be put forth to limit/eliminate wetlands from being contained within lot lines. There will be vegetated buffers of

no less than 100' will be provided from the edge of the wetlands as requested. The existing natural buffer along Herring Branch and the Little River will be maintained as requested.

The Farm Services Agency will be contacted to determine whether the farmed wetlands meet the recognized criteria for "prior converted wetlands." The importance of the headwater riparian wetlands associated with the Herring Branch and the Little River are acknowledged and the existing natural buffer that runs along Herring Branch and the Little River will be maintained.

Stormwater Management

As to stormwater management, all requirements will met by the developer. A stormwater management plan will be submitted for review and approval prior to any land disturbance . The required application and fees will be submitted along with the appropriate plans. Maintenance will be taken into account during the engineering and site design. Areas required for maintenance purposes will be indicated on the Record Plan. A soils investigation will be performed as part of the stormwater management design process.

Responses to the numbered comments are as follows:

1. The site engineer will consider the existing soil types as the site plan is developed taking into consideration the limitations and opportunities presented by each.
2. Proper drainage will be taken into consideration by the site engineer during the design of the stormwater management system.
3. The final design/size/configuration of the stormwater management system will be determined as part of the site design.
4. Bay Village will consider these issues during the design of the stormwater management system.
5. The full extent of the White Oak Tax Ditch will be shown on the revised plan.
6. The site engineer will endeavor to utilize the natural features of the site in the stormwater management systems.
7. The intent of this project is to integrate the natural features of the site with the built environment. This integration is to include the community landscape plan and the stormwater management design.

The comments in numbers 8 & 9 have been duly noted.

All comments regarding TMDL's and Water Supply have been noted. BMP's /BATS will be employed as methodological mitigative strategies to reduce degradative impacts associated with this development.

Water Resource Protection Areas (WRPA)

The recommended guidelines of the Source Water Protection Program will be followed as the site plan is designed and engineered.

Drainage

The White Oak Tax Ditch will be looked at closely during the site design and engineering phase. All maintenance issues will be addressed at that time. If the ditch is to be piped or otherwise altered the appropriate actions will be taken.

Habitat

The plan submitted to the City of Dover addresses this issue by indicating that a 100' building setback from the centerline of the Little River will be incorporated into the site plan.

Revegetation

The recommendations for revegetation have been noted.

Nuisance species

The Bay Village Development will make the stormwater areas as natural as possible using the prescribed species of vegetation. Every effort will be made to deter Canada geese through the use of natural means.

Open Space

Bay Village has limited forested areas. The public /recreation areas are planned to be adjacent to the forested areas. The open spaces will incorporate appropriate vegetation/plant material.

Private ownership of the wetlands and/or forested areas will be discouraged. As much as is feasible of these areas will be incorporated into a conservation easement.

Recreation

The plan submitted to the City of Dover shows sidewalks fronting all residences and street stubs including along White Oak Road. In addition, a series of bike/walking trails have been incorporated into the proposed site design.

Also included in the proposed site plan are areas dedicated to passive recreation, a community center, an outdoor theater area with pavilion, in addition to the water features provided by portions of the stormwater management.

Air Quality

Bay Village will comply with all laws regarding air quality. The overall concept of the site plan is to incorporate housing, commercial, retail, medical as well as other support services. We feel providing those services within the community will reduce the number and the length of the trips there by reducing the amount of emissions from automobiles. Additionally, due to the fact that this is a senior housing project the housing units will be designed as energy efficient as is practical.

Underground Storage Tanks

The comments regarding underground storage tanks have been duly noted.

Response to Comments from Department of Agriculture:

Bay Village will comply with all applicable Agricultural Preservation District restrictions.

Response to Comments from Public Service Commission:

The Public Service Commission comments have been noted.

Response to Comments from Delaware State Housing Authority:

The Delaware State Housing Authority comments that there should not be residential development east of S.R.1 because the area has been targeted for preservation. However, the entire area east of S.R.1 is not targeted for preservation. The Bay Village site is zoned agricultural which allows by right low density housing. A Planned Neighborhood Development for senior housing is a conditional use allowed in agricultural zoning. The City of Dover Comprehensive Plan states as its housing goals:

"Increase the livability of neighborhoods" and "continue to provide adequate and safe housing for seniors segment of population"¹¹

"The most dramatic trend in Dover's population distribution is the increasing number of residents who are 65 years old and older. The percentage of people over 65 will double by the year 2020. With respect to housing, this

¹¹ See the City's Comprehensive Plan at pages 15, 132.

population is expected to seek alternatives to the high costs and high maintenance demands of large single family homes."¹²

"Developments targeting this audience should be embraced!"¹³

"Demographic trends indicate a continued need for a variety of housing choices for all income levels and age groups."¹⁴

Therefore, Bay Village will meet the housing needs of senior citizens as targeted by the City of Dover Comprehensive Plan.

Response to Comments from Delaware Emergency Management Agency:

The comments of the Delaware Emergency Management Agency have been noted.

I trust the foregoing adequately responds to all of the PLUS comments submitted by various State agencies. If I am at all mistaken in this regard, please contact me immediately with any further questions you may have or additional responses you may deem necessary.

Thank you for your continuing courtesy in this matter.

Very truly yours,

JOHN W. PARADISE

JWP/lwr
Enclosure

pc: Ms. Constance C. Holland (Office of State Planning Coordination)
Mr. L.D. Shank
Mr. John W. Pepper (Project Manager)

¹² See the City's Comprehensive Plan at page 136.

¹³ See the City's Comprehensive Plan at page 136.

¹⁴ See the City's Comprehensive Plan at page 137.



STATE OF DELAWARE
EXECUTIVE DEPARTMENT
OFFICE OF
STATE PLANNING COORDINATION

February 10, 2005

Mr. James J. Galvin, Jr., AICP
Director of Planning and Inspections
City of Dover
15 E. Loockerman Street
Dover, DE 19901

RE: Bay Village of Dover Response to PLUS comments

Dear Mr. Galvin:

The State has received a copy of the January 3, 2005 letter to the City of Dover from John Paradee in response to the Preliminary Land Use Service (PLUS) comments received on the Bay Village of Dover project.

After reviewing the response letter from Mr. Paradee, the State would like to again like to voice our objections to this project and note that our original comments dated September 23, 2004 still stand as the State response to this project.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Constance C. Holland".

Constance C. Holland
Director

Cc: L.D. Shank
John W. Paradee