

## HICKS, ET AL.

### 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 Hicks 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 Complied with the Council's Remand Instructions**

The Hicks Appellants argue that the Commission did not comply with the Council's instructions on remand which stated:

"[T]his matter [is] remanded to the Commission for further consideration of the entire record, all evidence and facts of this Application in open session, to consult with its legal counsel, take a public vote thereon, with instructions to clearly state in the record reasons in support of the Commission's vote and, in accordance with 9 *Del C.* § 6811 and the Commission's Rules of Procedure, Section 15.4, to issue a written decision containing findings and conclusions that are consistent with the law."

Council finds that the Commission complied fully with these instructions. On June 23, 2022, the Commission reconsidered this matter in open session at a Commission meeting. The Commission's reconsideration included a comprehensive statement of the law by the Commission's legal counsel, confirmation from the Planning and Zoning Director Jamie Whitehouse that the Applicant's submission met all of the requirements for preliminary approval, a public vote based on 16 findings and 21 conditions enumerated in the motion for approval as read by counsel (3 "yes" votes, 1 "no" vote and 1 abstention) with each Commissioner stating the reasons for his or her respective vote), and, by letter dated June 24, 2022, a written decision was issued to the Applicant in accordance with the Planning and Zoning Commission's Rules of Procedures, Rule 15.4 ("[f]ollowing a decision by the Commission on an application, a copy of the written decision shall be sent to the applicant, or the agent or attorney for the applicant.").

In addition, the motion was specifically "based on the record made during the public hearing." The Commission was not required to hold a new hearing or restate the entire record in open session. The Commissioners were required to review and

reconsider the entire record, then vote in open session and provide reasons for their vote.

The comprehensive motion, vote, and reasons for such votes demonstrates the Commission's thorough consideration of the issues surrounding this Application as outlined in the record, thus confirming that the Commission engaged in an orderly and logical review of this Application based on the entire record prior to approving the Preliminary Subdivision Plan. In fact, Council had already found that the Commission engaged in an orderly and logical review of this Application following the initial appeal hearing filed by the Applicant thus negating the need to revisit it here.

The fact that legal counsel read the motion is immaterial. The motion itself was made by Commissioner Mears following the reading when he stated, "So moved". Moreover, in accordance with Rule 11.1 of the Planning and Zoning Commission's Rules of Procedure, the Commission follows Mason's Manual of Legislative Procedure. If a written motion is submitted, Section 156(3) permits a person other than the Commissioner making the motion to actually read the motion into the record.

Mr. Whitehouse's confirmation that the Application complies with the Subdivision and Zoning Code cannot be interpreted as the Commission delegating its authority to a staff member. It is common practice for Mr. Whitehouse to review and comment on subdivision applicants' compliance or noncompliance with the applicable Code provisions. In fact, Sussex County Code, §99-8B. mandates that staff review. However, Mr. Whitehouse does not make the final decision and does not have a vote; the final vote to approve or deny a subdivision application lies in the Commission only.

## **2. The Commission's June 23<sup>rd</sup> Decision was the Result of an Orderly and Logical Review of the Evidence**

The Hicks Appellants object to the Commissions' legal counsel providing legal guidance on the record and insinuates that this is akin to the "Commissioners voting the way their attorney told them to vote". This argument is flawed in several ways.

First, the Council expressly instructed the Commission "to consult with its legal counsel" during the process on remand. Clearly this was done, and it was done in open session thus providing complete transparency to the public.

Second, although each Commissioner provided reasons for his or her vote, it is important to note that one Commissioner voted "nay" and one Commissioner abstained. Had legal counsel or staff controlled their votes as the Hicks Appellants allege, one would expect that vote to be a unanimous approval. In order to perform an orderly, logical and thorough review, the Commission needed to not only have the facts and documentation available to it but the applicable law as well. This was this done and resulted in the imposition of extensive conditions of approval, including the denial of bonus density lots, reconfiguration of the lots, and more. These conditions must be complied with, or the project will not get built.

The Hicks Appellants also reiterate their objection to Mr. Whitehouse's confirmation that the Application complied with the applicable Code provisions. The Sussex County Code mandates staff review as to conformity with County requirements. However, the ultimate decision lies with the Commission.

**3. The June 23<sup>rd</sup> Approval Was Based on the Proper Application of the Law and Regulations.**

The Hick Appellants allege that the Commission's approval on remand "should be reversed because the record does not demonstrate that the decision involved a proper application of applicable law and regulation." The crux of their argument rests on the assertion that the Commission did not publicly deliberate or determine compliance with the law at the June 23<sup>rd</sup> meeting, but rather the Commission's legal counsel provided an extensive review of the law and the facts, and Mr. Whitehouse's confirmation that Application complied with the applicable ordinances. The Hicks Appellants fail to take into account the extensive written, record below, the public hearing, public input, agency input, several deferred votes to allow time for additional consideration, and more. The Commission has been reviewing this matter for months. The Code does not require the Commissioners to individually review all of the evidence and comment on it in open session. It does, however, require that each provide reasons for their vote which, upon remand, did occur.