

March 25, 2011

MEMORANDUM:

**To Accompany Request for Board of Adjustment Hearing
On the Ruddertowne Redevelopment Project**

From: Myron Beckenstein, Brooks Browne, Elizabeth Cadell, Henry Cadell, Joan Claybrook, Anne Duffin, Ann Durkos, Mike Durkos, Elissa Feldman, George Gephart, Nancy Gephart, Patricia L. Miller, Richard W. Miller, Anthony E. Murray, Lanie Odium

This memorandum is submitted to the Board of Adjustment under Section 185-66 of the Dewey Beach Zoning Code which authorizes the Board “To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the administration or enforcement of this chapter.”

On February 26, 2011, the Town Council of Dewey Beach voted 4 to 1 to adopt a resolution (number not yet assigned), “approving a Mutual Agreement and Release (MAR) regarding the Ruddertowne Redevelopment Project” signed on behalf of the town by the Town Manager, with representatives of Dewey Beach Enterprises (DBE) and Ruddertowne Redevelopment, Inc. In taking this action, the Town and DBE are violating numerous laws and regulations of the State of Delaware and the Town of Dewey Beach in a number of respects and not requiring Dewey Beach Enterprises to obey the same rules as other property owners. Our concern is that this violates established zoning law, sets a dangerous precedent for the town, and encourages other developers to behave in a like manner.

We note that under Section 185-83, it is clear that Chapter 185 governs Dewey Beach zoning decisions, and overrides lesser rules in the Mutual Agreement. It states, “It is not intended by this chapter to interfere with or abrogate or annul any easement, covenants, or other agreement between the parties; provided, however, that where this chapter imposes a greater restriction upon land development or construction, or the use of buildings or premises or upon height of buildings, or requires larger open spaces than are imposed or required by other resolutions, ordinances, rules, regulations, or by easements, covenants or agreements, the provisions of this chapter shall govern.”

**Refusal to Pass an Ordinance and Substituting a Voluntary Resolution Deprived
Citizens the Right to a Referendum**

Amending the Zoning Code requirements for the Ruddertowne project through a resolution (and not an ordinance) deprived property owners of their right to a referendum

under the Dewey Beach Charter. The Agreement entered into had the effect of an ordinance in that it altered the Zoning Code requirements with respect to the Ruddertowne project. Consequently, the citizens should have a right to a referendum under Section 23(a)(13)(a) of the Town Charter. On January 9, 2011, a citizens group, Citizens to Preserve Dewey, sent a letter to the Mayor and the four other commissioners requesting inclusion of a referendum if the Agreement were approved and numerous witnesses at the town meetings similarly made this request in their testimonies.

First, the mechanism used by the Town to grant a permit for building a huge condo/hotel complex on the Ruddertowne property that vastly exceeds the limits/prohibitions in the Dewey Beach Zoning code, is in the form of a resolution, not an ordinance. In order to change the zoning rules, passage of an ordinance is required following a number of procedural steps, including submission by the Town Council to the Planning and Zoning Commission for review, public hearings and recommendation to the Town Council prior to further public hearings by the Town Council. (Section 185-73). Alternatively, special exceptions or variances to the zoning rules must be considered by the Board of Adjustment upon request, although the Board of Adjustment is not obligated to grant any such requests. Neither of these legally authorized paths was followed.

Under common legal usage, an ordinance is a generally applicable a local law, passed by the legislative body and signed by the city executive (Mayor) and then subject to legal enforcement. Ordinances are the vehicle by which local laws are created and subsequently amended. So why has the Town of Dewey Beach and DBE used a resolution to implement their agreement instead of an ordinance, when the agreement will effectually amend the Town Code in several places with respect to the Ruddertowne project?

There is a powerful reason for the Town's decision to pass a "resolution" instead of an ordinance. It is to undermine the zoning approval process and purposefully deprive the property owners of their rights under the Dewey Beach Charter "to petition to require reconsideration by the Commissioners of Dewey Beach of any adopted Ordinance and to approve or reject it at a referendum election...." (Charter of the Town of Dewey Beach, Section 23(a)(13)(a)).

Passage of a "resolution" in lieu of an ordinance in an attempt to circumvent property owner rights under the Town Charter is a violation of the law of the State of Delaware. Furthermore, adopting the Agreement, despite it being done through a Resolution, has the effect of an ordinance by amending the Zoning Code but just with respect to the Ruddertowne project, and thus the citizens should have the right to a referendum under Section 23(a)(13)(a) of the Town Charter.

Several property owners asked the Town officials in the Frequently Asked Questions materials "What specific laws or codes empower our commissioners to grant exceptions to Dewey zoning codes in this proposed Agreement or any negotiated settlements, agreements or contracts?" And under FOIA to the Town on February 18, 2011, the request was made as follows: "For clarification, my request includes the following:

The enabling legislation in Delaware that empowers Town Council to enter into this agreement whereby zoning exceptions can be granted, any case law references that support your decision to enter into this agreement, and other supporting documents”.

The response to the FOIA from Town Manager Diana Smith on February 28, 2011, was: “The information you requested is exempt from disclosure under 29 Del.Code, section 10002(g)(9), which provides that ‘records pertaining to pending or potential litigation which are not records of any court’ are not ‘public records’ for purposes of FOIA.”

In other words, the Town claims it has no obligation to tell the property owners the legal basis for its illegal actions because there is pending litigation, even though the lawyers for the Town and for the developer DBE who sued the Town have been working in concert to design and justify the Mutual Agreement and Release. Further, it would appear logical that withholding information because of pending litigation can only be justified by the Town if the information is not known to the other party, i.e. DBE, which in this case it certainly is known. The only people kept in the dark are the citizens who are affected by the Ruddertowne development. A cardinal principle of zoning law is public participation and access to information. Without it, the zoning rules are not legitimate and must be overruled. In fact, the State of Delaware overruled the first version of the Dewey Beach Comprehensive Plan because there was not sufficient public participation.

The fixation with preventing the property owners from voting on the proposed development in a referendum has resulted in the town granting a building permit to DBE that violates a number of zoning requirements for the largest and most controversial development ever in the history of Dewey Beach—one that has the potential to alter the Town’s character, place stress on the Town’s infrastructure, police, public services and have a negative impact on overall safety. Interestingly, DBE, which has pushed for this decision running roughshod over the town rules, recently chastised the town in one of its lawsuits for adopting an ordinance requiring a public referendum for structures in excess of 35 feet in violation of its own procedures required for zoning changes. (Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, August 12, 2010, CA No. 4991-VCN).

Ruddertowne Project Violates Dewey Beach Zoning Laws

The approval of the Ruddertowne project violates the Laws of Dewey Beach by:

1. Authorizing the Commissioners to approve a building permit (instead of the building inspector);
2. Allowing DBE to build in excess of the height limitations;
3. Violating the height restrictions specified in the bulk standards;
4. Allowing hotels in a zone where they are not permitted;

5. Authorizing a building permit for time periods in excess of the Town Code requirements; and
6. Not having a referendum as required by ordinance 682.

The building permit granted to DBE by the MAR violates the requirements of Section 185-75 of the Dewey Beach Zoning Code, which requires a two-tiered process. The first step requires the Town Building Official to determine that the site plan complies with the zoning regulations, that the uses are permitted and that the structures meet all of the height, bulk and setback requirements. The second step then allows the Town Commissioners to add any special requirements that they deem appropriate. In the case of the DBE Ruddertowne development, the Town Building Official did not certify that the development complied with the zoning code. He could not in good faith have made this finding because the Agreement violates at least six major zoning regulations.

They are:

1. The Agreement violates the Town Zoning Code because the Commissioners do not have the authority under the Code to approve building permits. That authority resides with the Town Building Official who can only issue a building permit if he determines that buildings and their use comply with the zoning code regulations. (Section 71-8(a)). (Interestingly, DBE cites this rule in one of their lawsuits.) The Commissioners only have the authority to change the zoning code by ordinance if the majority believes a change is in the best interests of the Town. The Commissioners cannot even approve a site plan if the Building Official has not first determined that the plan complies with the basic zoning code regulations (Section 185-75(b)(1)).
2. The Agreement violates the Town Zoning Code because it would allow buildings in the RB-1 District to exceed the 35 foot height limit which has applied since the Town was incorporated. (Section 185-26.1(K)(1) and Table 2, Bulk Zoning Standards in All Districts). No ordinance has been passed by the Commissioners raising the height limit in the RB-1 District.
3. Insofar as the current Zoning Code applies to Ruddertowne, and insofar as “relaxed bulk standards” are alleged to apply to this project via the Comprehensive Plan, the Agreement also violates Section 185-26.1(K)(1) of the Zoning Code (pertaining to Ruddertowne’s RB-1 overlay district) which specifically states that “maximum zoning standards for height...shall not be relaxed from those indicated in Table 2, Bulk Zoning Standards in All Districts for the RB-1 Zoning District.”
4. The Agreement violates the Town Zoning Code because it authorizes a hotel use that is not a permitted, conditional or special exception use and therefore not a use that is currently allowed in RB-1 District without a change in the code. (Section

185-25)). Ordinance 430 adopted on April, 8, 2000 amended Section 503.2 “by deleting subsection 8 in its entirety (sic) to eliminate ‘hotels, motels and motor lodges’ as permitted uses in the resort Business District.” The Commissioners have not adopted an ordinance permitting new hotels.

5. The agreement violates the Town Zoning Code because it makes building permits valid for the Ruddertowne project for three years, with two automatic one year renewals, and a 6th year renewal upon approval of the Commissioners. By contrast, the Zoning Code limits the validity of a building permit to one year with a one-year renewal with one additional renewal in extraordinary circumstances subject to approval by the Commissioners. (Frequently Asked Questions, January 13, 2011, No. 38). Section 71-3(G). The Commissioners have not adopted an ordinance extending the life of a building permit.
6. The Agreement violates the Town Zoning Code because it does not comply with the requirements of Ordinance 682 that was adopted on June 10, 2010. This ordinance requires that before a permit can be issued to allow a building height to exceed 35 feet in Dewey Beach, such an action must be approved in a public referendum. There has been no referendum on this issue.

The Town now endorses the DBE position—that it is not violating any zoning codes. In response to the Frequently Asked Question No. 5 of February 7, 2011, the Town is quite definitive: “We are not aware of any laws which would permit us to negotiate a settlement or enter an agreement which would result in state or local law being violated. But as we have explained, the proposal and project which will result from the execution of the Mutual Agreement does not violate the Dewey Beach Zoning Code, or any other applicable law.”

Dewey Beach Enterprises alleges that these well-known requirements in the Dewey Beach Town Zoning Code are not being violated by their Ruddertowne project. DBE has constructed an elaborate justification that does not hold water and as a result of developing the Mutual Agreement in exchange for settling five pending lawsuits against the Town, DBE’s rationales now have the endorsement of the Dewey Beach town attorney and the attorney paid by the Darwin insurance company that insured the town.

This was not always the case as Town Attorney Glenn Mandalas explained at the Ruddertowne Town Workshop on February 3, 2011 and Public Hearing on February 5, 2011.

“One thing that we may be willing to do is to adopt certain positions in a settlement context that we would never adopt in a litigation context....I know that sounds like double talk, how can you take one position here, one position there. We only do it in situations where both sides have plausible arguments....(Ruddertowne Workshop 2, February 3, 2011).

“So we’ve taken a few positions...that may seem offensive....Most of those provisions that create that type of reaction are built more to avoid future challenges and put us in the best possible position should there be challenges that come. Again, I don’t want there to be this sense that the town has somehow adopted positions that are contrary to its interests.” (Ruddertowne Public Hearing, February 5, 2011).

Taking DBE assertions one by one, they fail individually and in combination to withstand scrutiny concerning compliance with the laws and rules of the State of Delaware and the Town of Dewey Beach.

1. The Ruddertowne Project Violates 22 Del. C. 307 Insofar as Any Authority Outside the Zoning Code is Relied on to Authorize Higher Building Heights

Under 22 Del. C. 307, no other regulation or authority may be used to circumvent the Zoning Code requirements regarding building height when the Zoning Code has the most restrictive height requirement.

The most critical lynchpin for DBE’s argument that the Ruddertowne project can be adopted is language in the Comprehensive Plan.

DBE alleges that the Comprehensive Plan, adopted by the Town on June 29, 2007 and approved by the State of Delaware on July 29, 2007, authorizes DBE to construct a building on the Ruddertowne property that is “inconsistent” with the Dewey Beach zoning rules. Their argument, as stated in the response to Frequently Asked Question No. 22 on January 13, 2011, is:

“The Agreement makes numerous references to the Comprehensive Plan because it is the one piece of law which the parties agree applies to the Ruddertowne redevelopment project.

“For example, Dewey Beach Enterprises is a successor of Highway One Limited Partnership (“Highway One”). Highway One is referenced in the Town’s Comprehensive Plan as follows:

“...with the development plans filed before the enactment of this Comprehensive Plan, which could be considered inconsistent with this Plan, the working group’s final agreement upon ratification by the Commissioners shall be considered consistent with the Plan.”

Unfortunately, this response is highly misleading in that it fails to fully quote the relevant parts of the Comprehensive Plan on pages 21 and 22.

The full two sentences are:

“Utilizing these elements, the following criteria are presented for consideration for the new Commercial Overlay Districts. It is the goal of this Comprehensive Plan to encourage the commercial and residential use of contiguous tracks of at least 80,000

square feet [the DBE Ruddertowne property consists of 80,000 contiguous square feet]. The percentages listed herein are the ideals of this Plan, however, with the development plans filed before the enactment of the Comprehensive Plan, which could be considered inconsistent with this plan, the working group's final agreement upon ratification by the Commissioners shall be considered consistent with the Plan.”

The minutes of the January 13, 2007, Town Council meeting at which this language for the Comprehensive Plan was discussed at length make it abundantly clear that it refers to the percentage allocation between commercial and residential in the RB districts, not on height or other zoning rules that the DBE Ruddertowne project violate. (Minutes available from Town Hall).

Please note the following:

- The full text quoted above makes it clear that the Comprehensive Plan does not grant unfettered authority to the Commission or the working group appointed by the Mayor to negotiate with Highway One to approve plans in violation of the Zoning Code. Read in context, any authorization granted by this language in the Comprehensive Plan is strictly limited to determining the percentages of residential to commercial use. This was an issue in dispute at the time. If the working group had any valid authority, it was limited to making a recommendation regarding this ratio, and nothing more.
- The Comprehensive Plan does not delegate authority to the Town Commissioners to circumvent Dewey Beach Zoning regulations. The Comprehensive Plan in Delaware has the force of law, but there is no way the General Assembly would write a blank check for municipalities to violate all other existing state and town regulations through the guise of the Comprehensive Plan.
- Under 22 Del. Code Section 307, whenever a Zoning Code requires a lower building height than another statute, ordinance or regulation, the lower building height restriction found in the Zoning Code governs. In other words, per state law, where the Dewey Beach Zoning Code prohibits buildings in excess of 35 feet, no statute, ordinance or regulation can circumvent this restriction, and it defies logic that the General Assembly intended to allow towns to bypass this state statute through the Comprehensive Plan.
- Further, and very importantly, there should never be a question regarding the difference between the Zoning Code and the Comprehensive Plan because the two must be consistent. Delaware law requires in 22 Del. Code, Section 303 that “[zoning] regulations be made in accordance with a comprehensive plan” and 22 Del. Code, Section 702(c) states that “[t]he comprehensive plan shall be the basis for the development of zoning regulations.” The Comprehensive Plan and the Zoning Code must be in agreement and any approved development plan or zoning code must be consistent with each other.

- Most basically, the Comprehensive Plan does not violate any state or local laws because it never touches on building height or hotels. These items are properly addressed in the Zoning Code. Although relaxed bulk standards are mentioned in the Zoning Code adopted to comply with the Comprehensive Plan, the parenthetical description in the Zoning Code and in the Comprehensive plan states “Relaxed bulk standards (setbacks, lot coverage, etc.)”. Height was not specified as a part of the town’s relaxed bulk standards. See p. 4, item 3 above. The Town Council in 2010 passed a clarifying ordinance that relaxed bulk standards do not apply to height and never applied to height in Dewey Beach. The height limitation in Dewey Beach was and is 35 feet, and unless the Zoning Code is amended or a variance is sought, this maximum height cannot be changed.

2. The Ruddertowne Architectural Committee Was Not the Official Working Group of the Comprehensive Plan Sanctioned by the State of Delaware

The Ruddertowne Architectural Committee (RAC) was not the official working group mentioned in the Comprehensive Plan and the RAC (or any other working group) could never have been vested with the authority to approve the Ruddertowne project in violation of the Town Code.

The second prong of DBE’s elaborate argument that its Ruddertowne project was authorized despite its violations of Dewey Beach zoning laws is that its proposal was endorsed by the Ruddertowne Architectural Committee (RAC). DBE inaccurately and repetitively refers to the RAC as the “working group”, attempting to cloak it with the authority and imprimatur of the “working group” referenced on page 22 of the Comprehensive Plan (which has the force of law). DBE’s assertions concerning the “working group” are fictional as was explained by a number of witnesses at the public workshops and hearings on the MAR. See specifically the report prepared by Anna Legates, a member of the RAC, on February 16, 2011 (available upon request: Annalegates@gmail.com).

In addition, then Town lawyer John Brady in a letter to DBE attorney Sean Tucker on November 8, 2007 (at the very time DBE was purchasing the Ruddertowne property from Highway One), with copies to the Commissioners and members of Planning and Zoning Commission, wrote:

“I do not agree with your analysis that the seven (7) to two (2) vote of the Ruddertowne Architectural Committee was an agreement entered into by the Town. There was no agreement reduced to writing between Highway One and the Town nor was any purported agreement approved or ratified by the Commissioners. The only thing the Commissioners did on July 13, 2007, was to forward your proposed ordinance to Planning and Zoning which, was subsequently returned to the Commissioners with a recommendation not to adopt. Your reliance in your letters on an agreement and adoption is incorrect. Your reliance on the Ruddertowne Architectural Committee entering into an agreement

by their seven (7) to two (2) vote on a proposal is incorrect. No agreement contemplated by the Comprehensive Plan has ever been voted upon by the Town Commissioners.”

The official Working Group and the Ruddertowne Architectural Committee (RAC) in fact are two different and distinct entities. But DBE has spent almost four years asserting that the RAC is the official working group referenced in the Comprehensive Plan. DBE does this because “[t]he reference to RAC in Paragraph 8(a) of the agreement is intended to tie the Ruddertowne project into a provision at page 21-22 of the Comprehensive Plan, which would make it consistent with the Plan and give it the force of law regardless of whether it is consistent with the zoning code.” (Response to Frequently Asked Question No. 8(a), January 31, 2011). Thus, the MAR rewrites history to issue a building permit for a non-compliant project.

DBE is piggybacking on this language to retroactively justify the legitimacy of the DBE Ruddertowne project that does not comply with numerous Town Zoning Code provisions. DBE claims that the official “working group” that is referenced in the Comprehensive Plan supported its proposal for a hotel/condo project at 68 feet and thus it is authorized by the Comprehensive Plan which has the force of law. This contention is not supported by the facts.

The official working group consisted of highly experienced Town volunteers who were appointed by the Mayor under Resolution 84 guidelines for the creation of town committees, were trained by staff from the Delaware Institute of Public Administration, began their service in September 2004 on framing the Comprehensive Plan, completing a draft on October 10, 2006 after many public meetings and workshops. (Town of Dewey Beach Comprehensive Plan 2007, page 5.)

A “wrap-up” meeting of the official working group was held on March 23, 2007 with P&Z, and the Commissioners prior to sending the plan to the State for final State approval (Minutes of the March 23, 2007 meeting). The RAC was not part of this process nor were any of its members part of the official working group. The Comprehensive Plan was designed to be the guide and the zoning codes were the nuts and bolts. ***The official working group did not make any recommendations concerning the Ruddertowne property at 68 feet or authorization for a new hotel. Its focus was on perfecting the Comprehensive Plan***

By contrast, the RAC first met on December 28, 2006. It was informally assembled when volunteers raised their hands and Commissioner Mike Eisenhauer took their names and offered to chair it. It did not follow the Resolution 84 guidelines and there were later additions and subtractions in the membership. The members of the two committees were entirely different (See Appendix A). The purposes of the two committees were entirely different. The RAC was totally focused on the Ruddertowne property (at that time a proposal for 48 townhouses was under consideration), not on the Comprehensive Plan for the Town.

The RAC was not even created before a draft of the Comprehensive Plan was prepared by the official working group in October 2006. It met eight times and at the final meeting on June 29, 2007, referred the Harvey Hanna (now DBE) proposed ordinance (to change the zoning law to allow it to build its 68 foot project) for consideration by the Town Commissioners. The Committee was then disbanded.

At the next Town Council meeting on July 13, 2007, Mr. Eisenhower, Chair of the RAC, orally presented the RAC final report. He said:

“On the 29th of last month [June] we had our final meeting of the Architectural Committee and at that point we voted to refer to the Town Council the proposal by the Harvey Hanna Group.” July 13, 2007 Town Council transcript, page 2, lines 5-8.

“And keep in mind, that we’re not voting on the proposal. What we’re doing is we’re just sending it to the Commission. We will send it to the Commission. The Commission will therefore after that refer it to Planning and Zoning and then Planning and Zoning will take it through the planning process.” July 13, 2007 Town Council transcript, page 2, lines 13 – 18.

“The committee was not charged with doing anything but discuss and work with the developer. We are not approving anything. The committee did not approve anything. They did not change anything. The only thing they did was go out and attempt to work with the developer, what were they going to propose to the Council. We took their proposal and passed it to the Council.” July 13, 2007 Town Council transcript, page 31, lines 2-10.

“We were not there to make any decisions. We didn’t vote on, we did not vote on whether it was a good program or a bad program.” July 13, 2007 Town Council transcript, page 33, line 13-14.

The Town Council then voted 3 to 2 to forward the 15 page ordinance proposed by Commissioners Mike Eisenhower and Claire Walsh supporting the DBE proposed zoning changes, including an RB-1 building height of 68 foot, to Planning and Zoning. [Mike Eisenhower subsequently in sent a letter dated October 2, 2007 to the Town Manager and the Chair of P&Z saying the Harvey Hanna proposed plan “met the basic requirements of the Certified Comprehensive Development Plan and was ratified by the Town Commissioners....” This revision of the history of the RAC contradicts everything preceding it and is the argument now used by DBE to justify its violation of the Dewey Beach zoning code).

P&Z subsequently recommended that the Commissioners not adopt the proposed ordinance because it was in the midst of rewriting the Zoning Code to comport with the Comprehensive Plan and did not want to make piecemeal exceptions until that effort was complete. The Town Council then rejected the DBE ordinance. *Thus, the*

two authoritative bodies concerned with zoning in Dewey Beach rejected the proposed 68 foot ordinance after it was referred to them by the RAC.

DBE's claim that it has the authority to violate Dewey Beach zoning codes is unsupported by law and is factually incorrect. That is why DBE has gone to great lengths to incorporate the RAC into the MAR, attempting to give the RAC legitimacy it does not warrant. This is a travesty and should be deleted from any agreement with the Town.

3. Phase II and III Building Permits for the 48 and 68 Feet are NOT Grandfathered Because There Was a Moratorium When They Were Submitted

The building permits for Phase II and Phase III were submitted at a time when a building moratorium was in place for the Town of Dewey Beach, and they should not be deemed to have been accepted for consideration by the Town of Dewey Beach until such time as the moratorium was lifted.

There has been confusion about DBE's claim that its 45.67 foot application is grandfathered. The answer to Frequently Asked Question # 31 dated January 31, 2011, helps to illuminate this issue. It states:

“DBE is not trying to relate this proposal back to the 35 foot plan for which it claims it got approval. Rather, it is treating this as an amendment or modification to the Phase II and III applications which were submitted in April of 2008, which include Plans for the 68-foot structure which was recommended by RAC. The facts surrounding the submission of and the Town's action on these plans are debatable, but they do support a conclusion that DBE submitted the plans, the Town did not act on the submission, and the submission therefore remains pending. As a modification to the Phase II and III plans, the argument goes, the 45.67 foot plan relates back to April 2008 – well before enactment of Ordinance 682 which authorizes a referendum on any ordinance passed that exceeds the Town's 35 foot height limit.”

Thus, DBE claims it is not covered by Ordinance 682 which was enacted over two years after April 2008, and the ordinance cannot be applied retroactively, thus voiding the authority for a public referendum on the Ruddertowne project increase in the 35 foot height limit.

However, Town Hall and DBE have ignored Ordinance 605, which enacted a moratorium on the acceptance of all new building applications. Either they knew about Ordinance 605 and covered it up, or they did not do their homework and were not aware of it. Either way DBE and the Town have seriously misled the property owners.

Ordinance 605 was adopted by the Town Council on November 10, 2007, and scheduled to terminate May 10, 2008. But the moratorium was renewed continuously through January 12, 2009 when the new zoning code was completed.

DBE submitted its Phase II and Phase III plans “for review only” on April 4, 2008. The Dewey Beach Building Official in a letter to DBE on April 22, 2008, after receipt of the DBE plans for the Ruddertowne development, stated, “At this time, there has been no final decision on what is to be done with the plans for Phase I [which was in litigation]. Therefore, no further consideration can be given to any future expansions to the project.” But he could not have acted anyway because there was a moratorium in place on all new applications.

Apparently no applications were filed after April 2008 because none were forthcoming from Town Hall in response to a FOIA request to Diana Smith, Dewey Beach Town Manager, on February 4, 2011 asking for all documents including letters and plans related to building applications by DBE, HHA and any other associated entity for building at 35 feet and also Phase II and Phase III applications at Ruddertowne.

If Town Hall has accurately responded to the FOIA request, then DBE’s contention that it is grandfathered and covered only by the old zoning code is incorrect, it’s contention that its application for a permit for Phase II and III was “filed” in April 2008 is incorrect, its contention that it filed its application after the adoption of the Comprehensive Plan in June/July 2008 but before the adoption of the new zoning code on January 12, 2009 is incorrect, and its contention that it is not subject to the provisions of Ordinance 682 authorizing a referendum if the building height exceeds 35 feet is incorrect.

It appears there is either negligence or misfeasance involved in the handling of these issues by the Town and possible attempts to mislead the public and Town Commissioners by DBE.

The MAR Smacks of Contract Zoning

“Development agreements take the form of bilateral contracts as the municipality and the developer exchange promises. As such, absent legislative authority, development agreements constitute illegal contract zoning. It is of critical legal consequence, therefore, that development agreements are entered into pursuant to express enabling legislation.” (Brad K. Schwartz, “Development Agreements: Contracting for Vested Rights”, 28 B.C. Env’tl Aff. L. Rev. 719 (2001), <http://lawdigitalcommons.bc.edu/ealr/vol28/iss4/13>).

Authorizing height and hotel construction in excess of the current town standards can be construed as contract zoning which is illegal in the State of Delaware. Contract zoning does not just involve agreements to rezone property. The Delaware Court of Chancery, in *Hartman v. Buckson*, 1983 Lexis 468 (Del. Ch. 1983) found contract

zoning when in response to a developer threatening to sue the Town of Camden over alleged zoning code infirmities, the town compromised with the developer with respect to how many units could be placed on a development parcel. There was no rezoning involved, just as there is no rezoning involved for Ruddertowne as the Town has rationalized granting the building permit.

The Ruddertowne plan is authorized pursuant to an agreement whereby both the town and developer each will receive various significant benefits. The agreement continually indicates that DBE is voluntarily agreeing to undertake certain actions. But if the agreement is truly voluntary, then they cannot be bound by the agreement. But if they are to be bound to the agreement, which they should be for a project of this magnitude and seriousness, it raises more than a suspicion of contract zoning.

After all, DBE has brought six costly lawsuits against the Town, it has sued three Town Commissioners and the P&Z Vice Chair personally. The tradeoffs here are dismissal of the lawsuits, a new town center for Dewey Beach and a few amenities as benefits for the Town on the one hand, and on the other, approval of the DBE building permit for a huge development that violates existing zoning laws, including particularly the 35 foot height limit for DBE, the authority to build a hotel which is not a permissible use in the zoning law, and an extra-long five year building permit. This certainly has all the markings of contract zoning.

In response to Frequently Asked Question No. 3 on February 7, 2011, the Town denied this agreement is contract zoning. It said: “Contract zoning occurs when a town and a developer enter a mutually binding agreement in which the town agrees to re-zone the developer’s property and the developer agrees to uses or restrictions on use which would not otherwise be required. The Mutual Agreement is a contract, but it is not contract zoning because 1) no provision of the Agreement changes the zoning classification of the Ruddertowne property, and 2) the agreement in no way obligates the Town to approve the Ruddertowne redevelopment proposal, nor does it obligate the Commissioners to approve the proposal.”

However, in the MAR, DBE is getting the authority to build its project without regard to the limitations in the zoning code, and while there is no obligation for the Town to approve the project, if it wants the five costly and time-consuming lawsuits dismissed, which it obviously does, it must authorize a building permit for the DBE project. The Town is also being given much needed 3000 square feet of space in the DBE project with “fit-out” at \$20 a square foot (MAR Resolution Section 4(3)(b). This sounds very much like bilateral exchanges. Dewey Beach Town Attorney Glenn Mandalas should know. He represented the Coalition for Transparent Government in Milton alleging contract zoning and the case was settled for his clients based on very similar arguments (Coalition for Transparent Government v. Town Council of the Town of Milton, Delaware, Chancery Court # 856-5777, stipulation of dismissal February 6, 2008.)

Conclusion

The heavy handed tactics practiced by DBE to secure the MAR in violation of the laws of the State of Delaware and Dewey Beach leads to only one conclusion—it must be overturned and sent back to the Town Council for reconsideration to lawfully authorize development on the Ruddertowne property.

Appendix A

Comprehensive Plan Working Group*

Met approximately 2 years

Listed in intro to Comp Plan

Harry Wilson, Chair

Ed Beste

Dale Cooke

Jim Dedes

Carolann Dryer

Robert Fitzgerald

David King

Suzanne Ziegler

Ruddertowne Architectural Committee (RAC)**

Met for six-month period

Not included in Comp Plan

Mike Eisenhauer, Commissioner & Chair

Claire Walsh, Commissioner

Paul Bauer

Bernadette Hearn, (replacement member); attended last 3 mtgs

Steve Montgomery (replacement member)

Vivian Barry

Diane Hanson

Carol Everhart

Anna Legates

* Compliant with Resolution 84; committee guidelines

**Non-compliant with Resolution 84

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