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Comments on Knolls of Dover DEIS And Related Documents

Introduction

On behalf of CRGD we submit these comments on the DEIS for the proposed Knolls of Dover project at the site of the former Harlem Valley Psychiatric Center. As outlined below and in the various comments submitted by CRGD's experts and members, there are significant deficiencies in both the Town Board's process and the contents of the DEIS. Nevertheless, CRGD strongly supports the redevelopment of HVPC as a mixed-use development. However, as proposed, the current plan has the potential to be more like a proverbial bait and switch where on first blush it appears to be a beneficial project, but careful analysis reveals that the impacts are understated and the assumptions governing the development are ephemeral with little or no guarantees that the final project will resemble what has been proposed in the DEIS. As a result, this project requires significant revisions to both assess the impacts and demonstrate controls to assure that development will proceed in accordance with the Master Development Plan. Given the significant information that is missing, it must be provided in a Supplemental Environmental Impact Statement and not in a Final EIS. There is no opportunity for the public to comment on a FEIS and thus a SEIS is the only way to assure meaningful comment and comply with the requirements of SEQRA.

Proposed Amendments to Sec. 145-16

The proposed amendments to the Dover Zoning Law present significant concerns regarding the MC Overlay District. Many of the proposed amendments are not considered in the DEIS and result in conclusory self-serving statements that are unsupported by any analysis.

As an initial matter, it must be noted that the text of Sec. 145-16 included in the DEIS and the Master Development Plan as the existing text to be amended, is wrong. The applicant has included the phrase "and rezone lands substantially contiguous to the MC District" as part of paragraph C (2) of the existing law. As the applicant and the Town Board are well aware, that language was added by the Town Board by Local Law 1 of 2008 and subsequently removed by

Local Law 2 of 2008 in response to litigation commenced by CRGD. That language must be removed and corrected.

That is not a minor matter. The applicant states repeatedly in the DEIS that it always contemplated that the Dykeman parcel would be included in its plans for HVPC and states that its inclusion will not have a material impact or change the character of the area. CRGD challenges those statements as will be more fully discussed below. However, as an initial matter, while the applicant may have long desired the inclusion of Dykeman in its Master Plan, there was never any legal agreement or assumption by the Town that it would be included. Since its adoption in 1999, and during the preceding analysis of how to redevelop the HVPC property as a planned development area, the Town only looked at the boundaries of the HVPC and the zoning map for the MC Overlay District was limited to those boundaries. If HVPC seeks to expand the Overlay District and increase the density on the Dykeman Parcel, then it must clearly consider the impacts of that action and demonstrate not only that it will not result in significant adverse impacts, but that it is consistent with the Dover Comprehensive Plan.

The proposed amendment also removes the density restrictions that currently exist in paragraph C which limits density increases to 50% of what would otherwise be permitted under the zoning law or a 100% bonus in the SR district. It replaces that language with a new paragraph D, entitled "Limitations on Development" which includes a blanket provision permitting 1.6 dwelling units per gross acre of land. That is a very insidious change which dramatically increases not only the permitted density of the project, but is contrary to the established principle in land use planning generally and specifically in the Dover zoning law that density bonuses are only allowed as a function of net developable land, not on a gross basis.

The proposed language could dramatically increase the proposed density. Under existing zoning the maximum density in the RU district would be 1.5 dwelling units per acre as compared to the 1.6 units proposed by the applicant. In the SR district, the applicant proposes a reduction from the 2 units per acre that could be permitted. However, in both cases, as well as for the other districts, the calculations are on the basis of gross acreage, not net. Therefore, it is impossible to determine if density is actually increasing or decreasing.

Chapter IIIA of the DEIS purports to provide an analysis that there is a net decrease in the permitted density under the amended law as contrasted with the existing law. However, this is impossible to verify and difficult to believe. While the DEIS includes some tables showing what respective development densities would be, there are no raw figures setting forth how the deductions for unbuildable areas were derived. Thus, we are forced to accept the claim of a net benefit to the Town on face value without any means to verify. It is also hard to believe that the applicant would go out of its way to amend the code and change the density formula, just to make it more restrictive. Under the existing law the densities are maximum figures, not minimum and of course there is nothing precluding the applicant from proposing a project density that is less than the maximum. This blatant attempt to manipulate the law shows an intent to increase permissible density, not reduce it.

The lack of veracity in the analysis is highlighted by the almost complete absence of any comparison layouts showing the densities with a conventional subdivision or providing the detailed analysis of the netting out of developable land. With one exception, the DEIS is completely silent on that basic information which would otherwise be required for a Flexible or Conservation Density Subdivision under the Dover zoning law. And the one exception proves our skepticism rather than demonstrates the applicant's good faith.

The DEIS repeatedly claims that development of the Dykeman parcel as part of the MC Overlay will not increase the permissible density. It is claimed that under the existing law, after netting out undevelopable land, that 63 lots could be developed on the 83 acre parcel. (Table III.A-3). However, Exhibit V-2, which purports to show a conventional layout on the Dykeman parcel, only provides for 60 lots. While it is not clear if even that layout properly netted out wetlands, floodplains and steep slopes, it demonstrates that even in that instance, the applicant is overstating the development potential of the Dykeman parcel.

Another major problem with the proposed zoning amendments is the proposal in paragraph C to exclude any further site plan review from SEQRA or a public hearing if the increases in project impacts do not exceed various 10% thresholds. This presents numerous problems.

First, this section uses inconsistent terms. On the one hand, the applicant is proposing to remove the term "conceptual site plan" throughout §145-16. On the other hand, in this paragraph only, the term is reinstated and says if the site plan is consistent with the conceptual site plan it largely avoids further review. Thus the question arises as to what is the conceptual site plan against which a future site plan is measured? Presumably it is the Master Development Plan, which at various instances in the DEIS and other documents is referred to as a "conceptual site plan". That question must be resolved.

Second, the concept of permitting 10% increases in size and impacts of the project, either on an individual or a cumulative basis, to avoid further review has no basis in law or public policy. SEQRA mandates a review of changes to a project to determine at that time, with the available information, if the changes to the project may have a significant impact. It is impossible, at this time, to determine that such *per se* increases will not have a significant impact. That is made more obvious in this instance as the DEIS is completely silent on assessing the potential impacts of the 10% increases in the described activities. The DEIS does not consider the impacts of such increases on wetlands, water supply, traffic or any other relevant area. Having failed to even conceptually address the potential impacts of such increases, the Town Board cannot make a blanket determination that the threshold for future impacts is a 10% increase.

Third, it is also wrong to provide, as the amendment proposes, that if an application for site plan approval is submitted that purports to be within the parameters of the conceptual plan plus 10% that the Town Board must approve the plan within 30 days of submission. It is notable that the word "submission" is used rather than a complete application, thus precluding the Town

Board from even determining if all of the information has been provided. Moreover, it effectively avoids any opportunity for a public hearing and comment. Given the very conceptual nature of the current application and the lack of specificity, the applicant is doing its utmost to avoid any further meaningful public review.

A final comment on the proposed amendment to the zoning law concerns paragraph F, where again the applicant is proposing to seriously dilute the purpose of the law. Rather than the original language that identified open space “resources designated for protection”, the proposed amended law only recognizes their “conservation value”, a weaker term that does not afford any solid protection. The harm is compounded by limiting the wetlands so designated from all wetlands, including federally and locally designated, to only those mapped by NYSDEC. And finally, rather than protecting all steep slopes, which have been recognized by the Town as those over 15%, the amended law would only recognize a value in those over 25% and even those are not clearly protected. Again the DEIS is completely silent on evaluating the impacts of these changes in language. This is particularly evident in the DEIS’ discussion of impacts to wetlands and steep slopes where the change in protection is not considered.

The substantive changes to §145-16 are themselves actions under SEQRA that must be considered. That none of the foregoing were addressed in the Scoping Document are of no relevance because these proposed changes were not included in the 2008 application materials. If the applicant is proposing these changes, it must fully evaluate the impacts of the changed language in comparison to the existing language and demonstrate that the changes will not have a significant impact on the environment.

Comments on the DEIS

The foregoing comments focused on the amendment to the zoning law and touched on the deficiencies in the DEIS on those issues. The following focuses on the DEIS itself.

Project Description

A consistent and recurring problem in both the DEIS and the Master Development Plan is a lack of detail on what exactly will be built where and in what phases. While the DEIS and Master Plan talk about a mix of residential housing, it is not clear that the mix is intended to be a binding commitment. Nor is there specific information as to where the specific uses will be. None of the conceptual site plans are definitive as to what types of housing will be present in which areas.

Even more significant is the complete absence of any commitment to the size and number of bedrooms of the types or mixes of housing. While some presumptions are used for the number of bedrooms in the respective units in the fiscal impact analysis, that is limited to that analysis and does not appear in the overall project description. Nor is it manifested in the Master Development Plan or the Design Guidelines. This is very important as it becomes the basis for consideration of many of the impacts of the project. The analysis of traffic impacts, water supply

and fiscal impacts are based upon an estimated population. However, if there is no certainty about the size of the residential units or the numbers of bedrooms, that analysis could be baseless. The Master Development Plan must be amended to provide specificity of the actual size and location of the various types of housing.

A related issue concerns the age restricted housing. While at various times the documents state that the housing will be limited to residents over 55, at other times it is clear that the age limit only applies to a single member of the household. There is no information as to how the age limit will be enforced and what assurances there will be that there will not be school age children in the housing. As set forth in the accompanying report by PPSA, the fiscal analysis must be corrected to reflect the reality that a significant percentage of the age restricted housing may actually house school age children.

The project also proposes to preserve significant areas as permanent open space, however it does not address what the ownership of those areas will be or how they will be maintained. The Town should not be required to accept responsibility for those areas and homeowner's associations are generally unreliable. The applicant should be required to identify a land conservancy that will take responsibility for the conservation areas and should be provided with a revenue stream to cover the costs of stewardship.

As noted above, the DEIS is devoid of any comparison of the net developable land area as composed to the gross land area. Since the applicant seeks to abandon the long-standing practice of determining density based on net land characteristics, it must do a comparison of changing from net to gross.

It is also repeatedly claimed that the addition of the Dykeman parcel will not result in any increased density for the project. However, the DEIS is silent as to how many dwelling units will be located on Dykeman or whether incorporation of Dykeman provides additional acreage that permits increased density elsewhere on the project site. Nor can it easily be assumed that on its own Dykeman could be developed to the magnitude of 60 lots without considering how it would provide for centralized water and sewer service. It would appear that density is only available by incorporating into the HVPC project, thus promoting the sprawl of intense development not otherwise contemplated in the SR district.

Phasing

There is insufficient information on the progress of the phases and little if any justification as to why the core area of HVPC, the corridor along Route 22 and the existing buildings, are not in the very first phase of redevelopment. If the overriding goal of the Town is to remove the blighting influence of the decaying structures they should be the area that is redeveloped first. We found nothing in the supporting reports from ERA that support a determination that it is necessary to develop other areas of the property first and delay the redevelopment of the core area to a later date. Furthermore, if some of the buildings are slated for demolition and the property not slated for new development until the future, the demolition of

those buildings should occur early in the process and not later so as to improve the aesthetics of the area and improve the attractiveness of the development that will proceed in the core area.

Given the ambitious nature of the project and the recognized uncertainty of the market, there must be assurances that future phases will be completed. In particular those related to the existing core of HVPC. The applicant must identify and the Town Board must require financial guarantees that the project will be completed. It must be noted that the 2006 Final Scoping Document included that requirement. It was removed from the 2008 Final Scoping Document.

Wetlands

While the DEIS provides some discussion on potential wetland impacts, there is no discussion regarding how the wetlands were avoided and why there could not be a greater avoidance of them. The first standard of review of wetland impacts is to avoid impacting them at all, not immediately moving towards mitigation.

While it is stated that 9.10 acres of state-regulated adjacent area will be impacted, it is not shown on a map and there is no information on how much area will be impacted in Phase I.

The wetland mitigation plan is very vague and lacks any detail on how the created wetlands will be monitored and maintained.

Wastewater Treatment

The DEIS recognizes that the existing wastewater treatment plant will need significant maintenance and upgrades. However, there are only conclusory statements that it will meet its existing effluent limits without any discussion as to what those limits are or the need to make those limits more restrictive. Since it has been decades since the SPDES permit was renewed and given the massive investment in a new project, it is appropriate to consider whether the effluent limits themselves should be reevaluated to determine if they are consistent with current water quality standards.

Alternatives

As a whole the Alternatives section is extraordinarily conclusory and lacking of supporting analysis to support a rejection of the lower density alternatives. While there are statements that the lower density alternative will have less impacts on wetlands and steep slopes, there is no quantification of the difference.

The dismissal of the lower density alternative because of the alleged added cost for the 18 hole golf course is also misplaced. First, there is absolutely no supporting figures showing that such an alternative is not financially practical. Second, while the Scoping Document required consideration of an 18-hole course, it specifically was limited to that configuration and the DEIS should have considered a 9-hole course if it is demonstrably more cost-effective.

Procedural Deficiencies

The Town Board has proceeded with the review of this project in a rushed manner resulting in an incomplete and, at times, untimely release of the relevant documents and an illegally truncated period for public comment.

As we noted last year, the Town Board impermissibly abandoned the previously duly adopted 2006 Final Scoping Document for this project and commenced a new scoping process which resulted in the adoption of a significantly revised new Final Scoping Document in June 2008. While there were new persons elected as Town Supervisor and to the Town Board, that is an insufficient basis to alter the Scoping Document, especially in a manner that reduced the thoroughness of the requirements for the DEIS.

Continuing the practice of facilitating approval and otherwise fast-tracking the project for the applicant, the Town Board released an incomplete DEIS on or about May 15, 2009. While that was the date that the DEIS was noticed, it was actually accepted on or about April 29, 2009, however copies of the DEIS were not available until May 15th and posted on the Town's website the same day. That posting was barely 2 weeks before the first public hearing and barely met the minimum requirements for public notice under SEQRA. However, even that release was inadequate for three important reasons. First, the posted DEIS did not include the legally mandated cover page and table of contents. That is not a minor matter as it is extremely difficult to review the DEIS and comprehend its organization or understand the location of figures and appendices without the table of contents. Second, the original notice of completion did not include a specific date by which written comments were due. Instead it stated that they would be accepted for a minimum of 10 days following the close of the public hearing. While the SEQRA regulations require that comments be accepted for that minimum time, it does not allow for an amorphous comment period that does not allow the public or involved agencies adequate notice of when the comments are due.

Third, and most importantly, the Town Board released the DEIS and noticed the public hearing without having either reviewed, accepted or released the document which is the crux of the proposed action – the Master Development Plan. It is our understanding that the Master Development Plan was never received or reviewed by the Town Board until late May 2009. While the Town's website says that it was posted on May 29th, in reality it was not posted until on or about June 3rd, since no one was aware of it until the morning of the first public hearing on May 30th.

Nevertheless, the Town Board, on June 3rd, voted to extend the public comment period until June 30, 2009. While it is beneficial that the Town Board recognized the need to set a date for the end of the comment period and not try to limit it to June 13th, the June 30th date is still illegally short. At a minimum, in accordance with 6 NYCRR § 617.9(a)(4)(iii), the comment period would have to be July 3rd. However that date is also too short. Per the Town's own

zoning code §145-16 governing the MC Overlay District, the Planning Board is provided a minimum of 62 days to review the comprehensive plan for the MC Overlay District and the DEIS. The current Town Board made that specific change to §145-16 when it assumed responsibility for site plan review in the MC Overlay District and assured the Planning Board that it would have an adequate opportunity to review any application for the district. Therefore, applying the mandatory 62 day review time to the dates discussed above, the minimum comment period for the Planning Board would be until July 16, 2009 (62 days after May 15th). In fact the comment period should last until August 4, 2009 (62 days after June 3rd, the date the full application and supporting materials were available). Obviously, if the Planning Board has until July 16th or August 4th to provide comments, the public and involved agencies should be given the same amount of time. Given the enormity of the DEIS and since there is absolutely no prejudice to the applicant, the comment period should be equal for all parties. Therefore, CRGD reserves the right to supplement these comments up to August 4, 2009.

The foregoing are not minor deficiencies in the SEQRA process, but go to the opportunity of the public to participate in a meaningful manner. The courts have long-held that agencies are held to a strict and literal compliance with the procedural requirements of SEQRA and its implementing regulations. *Matter of King v. Saratoga County Bd. of Supervisors*, 89 N.Y. 2d 341.

Conclusion

Approval of the redevelopment of HVPC should only proceed upon a well considered plan that is supported by an accurate EIS. As outlined above, there is insufficient supporting information to confirm the densities proposed by the applicant. The proposed revisions to the zoning law have not been considered in the DEIS and present fundamental changes to the law that are contrary to public policy. Finally, the Town Board should demonstrate its compliance with SEQRA and respect for public participation by clearly extending the time period for public comment.

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June 30, 2009